

20 Am. Jur. 2d Counterclaim, Recoupment, Etc. Summary

American Jurisprudence, Second Edition | May 2021 Update

Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

[Correlation Table](#)

Summary

Scope:

This article discusses the rights of counterclaim, recoupment, and setoff generally and in particular types of actions. Included in the discussion are the relationship of counterclaim, setoff, and recoupment to the plaintiff's action, the mutuality of parties and demands, the effect of assignment, claims by and against the government, and pertinent matters of pleading.

Federal Aspects:

Several federal statutes and rules of procedure address counterclaims generally and in specific contexts.

Treated Elsewhere:

Abatement of action if claim on which it is based could have been pleaded as setoff or counterclaim in pending action, see [Am. Jur. 2d, Abatement, Survival, and Revival §§ 30, 31](#)

Account stated, setoff and counterclaim with regard to action on, see [Am. Jur. 2d, Accounts and Accounting § 46](#)

Affirmative defense and counterclaim distinguished, see [Am. Jur. 2d, Pleading § 276](#)

Alternative pleading, counterclaim as, under federal practice, see [Am. Jur. 2d, Pleading § 63](#)

Antitrust claim as defense or counterclaim, see [Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 315, 458](#)

Article 9 of Uniform Commercial Code as generally not applying to right of recoupment or setoff, see [Am. Jur. 2d, Secured Transactions § 108](#)

Assignment for benefit of creditor, effect on prior right of setoff or counterclaim on, see [Am. Jur. 2d, Assignments for Benefit of Creditors § 82](#)

Attorney's special or charging lien, priority as to set off by defendant, see [Am. Jur. 2d, Attorneys at Law § 325](#)

Bank's lien and right of setoff, see [Am. Jur. 2d, Banks and Financial Institutions §§ 842 to 871](#)

Bills and notes, claims in recoupment as to, see [Am. Jur. 2d, Bills and Notes §§ 572 to 576](#)

Broker's offsetting of orders of different customers of stock, see [Am. Jur. 2d, Brokers § 188](#)

Building and construction contracts, counterclaim or setoff in actions involving, see [Am. Jur. 2d, Building and Construction Contracts § 120](#)

Consumer credit protection actions against creditors, recoupment, setoff, and counterclaim in, see [Am. Jur. 2d, Consumer and Borrower Protection §§ 130, 141](#)

Contribution, cross-claims, counterclaims, and joinder for purpose of obtaining, see [Am. Jur. 2d, Contribution §§ 103 to 111](#)

Cross complaints, see [Am. Jur. 2d, Pleading §§ 355 to 362](#)

Declaratory judgment suit, counterclaim filed in, see [Am. Jur. 2d, Declaratory Judgments § 224](#)

Dismissal: voluntary termination of cause of action by counterclaimant, see [Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit § 22](#); effect of failure to file counterclaim until after attempt to dismiss, see [Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit § 84](#)

Ejectment action, entitlement of defendant in, for setoff for improvements, or taxes against damages or mesne profits, see [Am. Jur. 2d, Ejectment § 52](#)

Employees' actions under Fair Labor Standards Acts and similar laws, setoffs, and counterclaims of employers in, see [Am. Jur. 2d, Labor and Labor Relations §§ 3396, 3478](#)

Equitable claim, counterclaim to complaint or bill that asserts, see [Am. Jur. 2d, Equity §§ 190, 191, 202](#)

Executors and administrators: setoff and counterclaim in actions against representative's surety, see [Am. Jur. 2d, Executors and Administrators § 1081](#); actions by or against third parties, see [Am. Jur. 2d, Executors and Administrators § 1087](#)

Forcible entry and detainer, setoff and counterclaim in action for, see [Am. Jur. 2d, Forcible Entry and Detainer § 46](#)

Improvements, occupant's right of setoff for, see [Am. Jur. 2d, Improvements § 5](#)

Interest, effect of unliquidated counterclaim or setoff on, see [Am. Jur. 2d, Damages § 484](#)

Judgments, setoff of, against one another, in satisfaction of, generally, see [Am. Jur. 2d, Judgments §§ 828 to 831](#)

Jurisdiction of court to adjudicate counterclaim in excess of jurisdictional amount, see [Am. Jur. 2d, Courts § 110](#)

Landlord and tenant: setoffs and counterclaims to summary possessory actions, see [Am. Jur. 2d, Landlord and Tenant §§ 876 to 879](#)

Miller Act payment bond, allowability of defendant's counterclaim in action as to, see [Am. Jur. 2d, Contractors' Bonds §§ 178, 179](#)

Mortgages: setoff and recoupment with regard to assignment of mortgages, see [Am. Jur. 2d, Mortgages §§ 994, 995](#); setoff, recoupment, and counterclaim as to actions to foreclose mortgages, see [Am. Jur. 2d, Mortgages §§ 560, 631 to 633](#)

Motor vehicle accidents, counterclaims or setoff in civil actions pertaining to, see [Am. Jur. 2d, Automobiles and Highway Traffic § 1058](#)

Parties, counterclaim or cross-claim as mode of bringing into action, see [Am. Jur. 2d, Parties § 278](#)

Receivers or receivership, setoff and counterclaim in actions relating to, see [Am. Jur. 2d, Receivers §§ 267 to 271, 373 to 377, 393](#)

Replevin actions, setoff, counterclaim, and recoupment in regard to, see [Am. Jur. 2d, Replevin §§ 34, 35](#)

Res judicata and collateral estoppel, applicability to setoffs and counterclaims, see [Am. Jur. 2d, Judgments §§ 501, 503 to 505](#)

Sales, setoff, recoupment, and counterclaim with regard to, see [Am. Jur. 2d, Sales §§ 992, 1042](#)

Sanctions under Federal Rule of Civil Procedure where attorney knows counterclaim is false but allows issue to go to trial, see [Am. Jur. 2d, Pleading § 569](#)

Separate trial on counterclaim, discretion of court to order, see [Am. Jur. 2d, Trial § 81](#)

Statutes of limitation, applicability of to counterclaims and setoffs, see [Am. Jur. 2d, Limitation of Actions §§ 100 to 102](#)

Trademark infringement, action to enjoin, assertion of superior right to use of trademark or trade name by counterclaim or cross complaint, see [Am. Jur. 2d, Trademarks and Tradenames § 145](#)

Trusts, setoff or counterclaim as pertaining to actions as to, see [Am. Jur. 2d, Trusts § 653](#)

Research References:

Westlaw Databases

- [All Federal Cases \(ALLFEDS\)](#)
- [All State Cases \(ALLSTATES\)](#)
- [American Law Reports \(ALR\)](#)
- [West's A.L.R. Digest \(ALRDIGEST\)](#)
- [American Jurisprudence 2d \(AMJUR\)](#)
- [American Jurisprudence Legal Forms 2d \(AMJUR-LF\)](#)
- [American Jurisprudence Proof of Facts \(AMJUR-POF\)](#)
- [American Jurisprudence Pleading and Practice Forms Annotated \(AMJUR-PP\)](#)
- [American Jurisprudence Trials \(AMJUR-TRIALS\)](#)
- [Code of Federal Regulations \(CFR\)](#)
- [Federal Procedure \(FEDPROC\)](#)
- [Federal Procedural Forms \(FEDPROF\)](#)
- [Uniform Laws Annotated \(ULA\)](#)

[United States Code Annotated \(USCA\)](#)

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. I A Refs.

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Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

I. In General

A. Overview; Definitions

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  1, 3, 5 to 9, 24, 60

A.L.R. Library

A.L.R. Index, Counterclaim, Recoupment, and Setoff

A.L.R. Index, Pleadings

West's A.L.R. Digest, [Set-off and Counterclaim](#)  1, 3, 5 to 9, 24, 60

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 1

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Counterclaim, Recoupment, and Setoff

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I. In General

A. Overview; Definitions

1. Counterclaim

§ 1. Generally

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West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  1, 3, 5, 9

A counterclaim is a counterdemand or a cause of action that exists in favor of the defendant against the plaintiff,¹ and on which the defendant might have brought a separate action and recovered judgment.² A counterclaim represents the defendant's right to have the claims of the parties counterbalanced, in whole or in part, and to have judgment entered for any excess.³

If established, a counterclaim tends to defeat or in some way qualify the judgment or relief to which the plaintiff is otherwise entitled.⁴ A counterclaim does not seek to defeat the plaintiff's claim as a cause of action;⁵ rather, it is an independent,⁶ affirmative claim for relief.⁷ Indeed, a counterclaim presupposes affirmative relief and may be entitled to adjudication, even after the plaintiff has voluntarily dismissed his or her complaint.⁸

The term "counterclaim" was not known to the common law.⁹ As a code term,¹⁰ it owes its existence to statutory law.¹¹

Observation:

Statutes or rules providing for counterclaims are to be liberally construed.¹²

The purpose of a counterclaim is to grant the court broad discretion to allow claims to be joined for the resolution of all controversies between the parties in one suit and to eliminate the inordinate expense occasioned by multiple litigation.¹³

Generally, counterclaims are either compulsory (required to be made) or permissive (at the option of the defendant or the court).¹⁴ In some jurisdictions, however, there are no compulsory counterclaims.¹⁵

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Footnotes

- 1 U.S. for Use and Benefit of Greenville Equipment Co. v. U.S. Cas. Co., 218 F. Supp. 653 (D. Del. 1962); Vinings Bank v. Brasfield & Gorrie, LLC, 759 S.E.2d 886, 84 U.C.C. Rep. Serv. 2d 81 (Ga. Ct. App. 2014); Citicorp Sav. of Ill. v. Rucker, 295 Ill. App. 3d 801, 230 Ill. Dec. 153, 692 N.E.2d 1319 (1st Dist. 1998); Hackathorn v. Four Seasons Lakesites, Inc., 959 S.W.2d 954 (Mo. Ct. App. S.D. 1998).
The term "counterclaim" is a general and comprehensive one, naturally including within its meaning all manner of permissible counterdemands. 98 Lords Highway, LLC v. One Hundred Lords Highway, LLC, 138 Conn. App. 776, 54 A.3d 232 (2012).
- 2 Long v. Clark, 226 Ariz. 95, 244 P.3d 99 (Ct. App. Div. 1 2010); Baker v. Littman, 138 Cal. App. 2d 510, 292 P.2d 595 (2d Dist. 1956); Paul v. Kuntz, 524 N.E.2d 1326 (Ind. Ct. App. 1988); Fitzke v. Fitzke, 210 Minn. 430, 298 N.W. 712 (1941); McGerr v. Marsh, 148 Neb. 50, 26 N.W.2d 374 (1947); Rose v. Motes, 220 S.W.2d 734 (Tex. Civ. App. Galveston 1949).
A counterclaim is in effect a separate and distinct action brought by the defendant against the plaintiff. Micro-Link, LLC v. Town of Amherst, 109 A.D.3d 1130, 972 N.Y.S.2d 369 (4th Dep't 2013).
- 3 Olsen v. McMaken & Pentzien, 139 Neb. 506, 297 N.W. 830 (1941); Department of Highways v. Dijoseph, 41 Pa. D. & C.2d 435, 1967 WL 8745 (C.P. 1967).
- 4 § 30.
- 5 John Evans Sons, Inc. v. Majik-Ironers, Inc., 95 F.R.D. 186, 36 Fed. R. Serv. 2d 782 (E.D. Pa. 1982); Home Oil Co., Inc. v. Todd, 195 Conn. 333, 487 A.2d 1095 (1985); Haven Federal Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730 (Fla. 1991); Citicorp Sav. of Ill. v. Rucker, 295 Ill. App. 3d 801, 230 Ill. Dec. 153, 692 N.E.2d 1319 (1st Dist. 1998); Matter of Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).
- 6 John Evans Sons, Inc. v. Majik-Ironers, Inc., 95 F.R.D. 186, 36 Fed. R. Serv. 2d 782 (E.D. Pa. 1982); Long v. Clark, 226 Ariz. 95, 244 P.3d 99 (Ct. App. Div. 1 2010); Chief Information Officer v. Computers Plus Center, Inc., 310 Conn. 60, 74 A.3d 1242 (2013); Haven Federal Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730 (Fla. 1991); Citicorp Sav. of Ill. v. Rucker, 295 Ill. App. 3d 801, 230 Ill. Dec. 153, 692 N.E.2d 1319 (1st Dist. 1998); Gibson v. City of St. Louis, 349 S.W.3d 460 (Mo. Ct. App. E.D. 2011); Matter of Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981); Kaiser by Taylor v. Monitrend Inv. Management, Inc., 672 A.2d 359 (Pa. Commw. Ct. 1996).
- 7 John Evans Sons, Inc. v. Majik-Ironers, Inc., 95 F.R.D. 186, 36 Fed. R. Serv. 2d 782 (E.D. Pa. 1982); Ameriquist Mortg. Co. v. Lax, 113 Conn. App. 646, 969 A.2d 177 (2009); Haven Federal Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730 (Fla. 1991); Avenaim v. Lubecke, 347 Ill. App. 3d 855, 283 Ill. Dec. 227, 807 N.E.2d 1068 (1st Dist. 2004); Matter of Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981); State ex rel. Key West Retaining Systems, Inc. v. Holm II, Inc., 185 Or. App. 182, 59 P.3d 1280 (2002); Kaiser by Taylor v. Monitrend Inv. Management, Inc., 672 A.2d 359 (Pa. Commw. Ct. 1996).
A counterclaim is not simply a "defensive pleading" but is an affirmative effort to enforce an affirmative claim. Charles A. Manganaro Consulting Engineers, Inc. v. Carneys Point Tp. Sewerage Authority, 344 N.J. Super. 343, 781 A.2d 1116 (App. Div. 2001).

An affirmative claim, stated in an answer, for recovery of attorney's fees for the preparation and prosecution of a defense constitutes a counterclaim. *In re Frost Nat. Bank*, 103 S.W.3d 647 (Tex. App. Corpus Christi 2003).

8 *Northern Ins. Co. of N. Y. v. Grone*, 126 F. Supp. 457 (M.D. Pa. 1954); *ITT Commercial Finance Corp. v. Riehn*, 796 S.W.2d 248, 13 U.C.C. Rep. Serv. 2d 637 (Tex. App. Dallas 1990).

9 *Valley Gin Co. v. McCarthy*, 56 Ariz. 181, 106 P.2d 504 (1940); *Harry I. Soble, Inc. v. Fiske Lumber Co.*, 96 N.H. 279, 74 A.2d 381 (1950); *Turkenkoph v. Te Beest*, 1951-NMSC-047, 55 N.M. 279, 232 P.2d 684 (1951); *Hood Lumber Co. v. Five Points Lumber Co.*, 193 Tenn. 681, 249 S.W.2d 896 (1952).

10 *Hood Lumber Co. v. Five Points Lumber Co.*, 193 Tenn. 681, 249 S.W.2d 896 (1952).

11 *Fontenot v. Roach*, 120 F. Supp. 788 (E.D. Tenn. 1954); *Valley Gin Co. v. McCarthy*, 56 Ariz. 181, 106 P.2d 504 (1940); *Turkenkoph v. Te Beest*, 1951-NMSC-047, 55 N.M. 279, 232 P.2d 684 (1951).

12 *Linscott v. Linscott*, 243 Iowa 335, 51 N.W.2d 428, 30 A.L.R.2d 789 (1952); *Salina Coca-Cola Bottling Corp. v. Rogers*, 171 Kan. 688, 237 P.2d 218 (1951); *Swafford Motor Co. v. Woods*, 155 S.W.2d 550 (Mo. Ct. App. 1941); *Standard Amusement Co. v. Tarkington*, 247 N.C. 444, 101 S.E.2d 398 (1958); *Perrault v. Holland*, 1961 OK 54, 360 P.2d 240 (Okla. 1961).

13 *Hearn v. Autumn Woods Office Park Property Owners Ass'n*, 757 So. 2d 155 (Miss. 1999).

14 *Bacompt Systems, Inc. v. Ashworth*, 752 N.E.2d 140 (Ind. Ct. App. 2001).

As to compulsory counterclaims, generally, see § 3.

As to permissive counterclaims, generally, see § 4.

15 *UBS Securities LLC v. Highland Capital Management, L.P.*, 86 A.D.3d 469, 927 N.Y.S.2d 59 (1st Dep't 2011); *State ex rel. English ex rel. Sellers v. Multnomah County*, 348 Or. 417, 238 P.3d 980 (2010).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 2

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Counterclaim, Recoupment, and Setoff

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I. In General

A. Overview; Definitions

1. Counterclaim

§ 2. Compared with recoupment and setoff

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  5 to 9

The term "counterclaim" is generic¹ and includes both recoupment and setoff.² However, a counterclaim is generally broader than either recoupment or setoff, in that it may be used as a basis for affirmative relief.³

Observation:

In at least one jurisdiction, distinctions between counterclaims and setoffs have been dissolved.⁴

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Footnotes

- 1 [U.S. for Use and Benefit of Greenville Equipment Co. v. U.S. Cas. Co., 218 F. Supp. 653 \(D. Del. 1962\); Gattoni v. Zaccaro, 52 Conn. App. 274, 727 A.2d 706 \(1999\).](#)

- 2 *Shump v. Balka*, 574 F.2d 1341, 25 Fed. R. Serv. 2d 857 (10th Cir. 1978); *U.S. for Use and Benefit of Greenville Equipment Co. v. U.S. Cas. Co.*, 218 F. Supp. 653 (D. Del. 1962); *Baxter v. Fairfield Financial Services, Inc.*, 307 Ga. App. 286, 704 S.E.2d 423 (2010); *Etheridge v. Wescott*, 244 N.C. 637, 94 S.E.2d 846 (1956); *Harmer v. Hulsey*, 321 Pa. Super. 11, 467 A.2d 867 (1983).
"Counterclaim" means the assertion of a right to have affirmative judgment against an adversary based upon a setoff or recoupment. *Imbesi v. Carpenter Realty Corp.*, 357 Md. 375, 744 A.2d 549 (2000).
As to recoupment, generally, see § 5.
As to setoff, generally, see § 6.
- 3 *Shump v. Balka*, 574 F.2d 1341, 25 Fed. R. Serv. 2d 857 (10th Cir. 1978); *Etheridge v. Wescott*, 244 N.C. 637, 94 S.E.2d 846 (1956); *Conway v. Ogier*, 115 Ohio App. 251, 20 Ohio Op. 2d 324, 184 N.E.2d 681 (10th Dist. Franklin County 1961); *State ex rel. Key West Retaining Systems, Inc. v. Holm II, Inc.*, 185 Or. App. 182, 59 P.3d 1280 (2002).
- 4 *Bailey-Allen Co., Inc. v. Kurzet*, 945 P.2d 180 (Utah Ct. App. 1997).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 3

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Counterclaim, Recoupment, and Setoff

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I. In General

A. Overview; Definitions

1. Counterclaim

§ 3. Compulsory counterclaims

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West's Key Number Digest, [Set-off and Counterclaim](#) , 60

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[Failure to assert matter as counterclaim as precluding assertion thereof in subsequent action, under federal rules or similar state rules or statutes, 22 A.L.R.2d 621](#)

[Claim for underlying debt as compulsory or permissive in action asserting creditor's civil liability under sec. 130\(a\) of Truth in Lending Act \(15 U.S.C.A. sec. 1640\(a\)\) for violation of Act, 51 A.L.R. Fed. 509](#)

[Claim as to which right to demand arbitration exists as subject of compulsory counterclaim under Federal Rules of Civil Procedure 13\(a\), 2 A.L.R. Fed. 1051](#)

Forms

[Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure §§ 117 to 131 \(Counterclaims and cross-claims\)](#)

A compulsory counterclaim is one which must be raised by the defendant in the plaintiff's action against him or her or else be barred.¹ A compulsory counterclaim is generally required to arise out of the same transaction or occurrence as the opposing

party's claim.² In fact, the Federal Rules of Civil Procedure provide that a pleading must state as a counterclaim any claim that, at the time of its service, the pleader has against an opposing party if the claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim,³ and does not require adding another party over whom the court cannot acquire jurisdiction.⁴ Accordingly, there must be a cause of action by the plaintiff to which the compulsory counterclaim can be filed.⁵ In other words, for a claim to be a compulsory counterclaim, there must be parties which are opposing, that is, there must be a party who asserts a claim against the prospective counterclaimant in the first instance.⁶

Observation:

By ensuring that only one judicial proceeding is required to settle all matters determinable by the same facts or law, the compulsory counterclaim rule serves to prevent the fragmentation of litigation and multiplicity of suits.⁷ Economy and efficiency are the overriding purposes of the compulsory counterclaim rule, forcing parties to bring all the claims logically related to the main claim or else be barred from ever doing so in the future.⁸ Thus, the purpose of the rule making certain counterclaims compulsory is to enable one court to resolve all related claims in one action, thereby avoiding a wasteful multiplicity of litigation.⁹

As exceptions to the compulsory counterclaim rule, the Federal Rules provide that the pleader need not state the claim if, when the action was commenced, the claim was the subject of another pending action;¹⁰ or the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this Rule.¹¹

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Footnotes

- 1 [McDaniel v. Anheuser-Busch, Inc.](#), 987 F.2d 298, 25 Fed. R. Serv. 3d 1025 (5th Cir. 1993); [Mirchandani v. BMO Harris Bank, N.A.](#), 235 Ariz. 68, 326 P.3d 335 (Ct. App. Div. 1 2014); [Richards v. Wells Fargo Bank, N.A.](#), 325 Ga. App. 722, 754 S.E.2d 770 (2014); [Keystone Freight Corp. v. Bartlett Consol., Inc.](#), 77 Mass. App. Ct. 304, 930 N.E.2d 744 (2010); [Collection Center, Inc. v. Bydal](#), 2011 ND 63, 795 N.W.2d 667 (N.D. 2011); [Moore v. First Financial Resolution Enterprises, Inc.](#), 277 S.W.3d 510 (Tex. App. Dallas 2009).
The compulsory counterclaim is a means of bringing together all logically related claims into a single litigation, through the penalty of precluding the later assertion of omitted claims. [Dunn Indus. Group, Inc. v. City of Sugar Creek](#), 112 S.W.3d 421 (Mo. 2003).
As to permissive counterclaims, see § 4.
- 2 [Mirchandani v. BMO Harris Bank, N.A.](#), 235 Ariz. 68, 326 P.3d 335 (Ct. App. Div. 1 2014); [E-21 Engineering, Inc. v. Steve Stock & Associates, Inc.](#), 252 P.3d 36 (Colo. App. 2010); [Cunningham v. MBNA America Bank, N.A.](#), 8 So. 3d 438 (Fla. 2d DCA 2009); [Wachovia Bank, Nat. Ass'n v. Blackburn](#), 407 S.C. 321, 755 S.E.2d 437 (2014).
- 3 [Fed. R. Civ. P. 13\(a\)\(1\)\(A\)](#).
The defendants' claim for medical malpractice was a compulsory counterclaim to the plaintiff's claim for unpaid medical bills, since the malpractice claim arose from the same transaction or occurrence that was the subject matter of the plaintiff's claim. [Geisinger Medical Center v. Gough](#), 160 F.R.D. 467 (M.D. Pa. 1994).

As to the requirement that a compulsory counterclaim arise out of the transaction or occurrence that is the subject matter of the opposing party's claim, see §§ 31 to 33.

§ 57.

Dow Chemical Co. v. Metlon Corp., 281 F.2d 292, 3 Fed. R. Serv. 2d 148 (4th Cir. 1960); Lawhorn v. Atlantic Refining Co., 299 F.2d 353, 5 Fed. R. Serv. 2d 87 (5th Cir. 1962).

Computer One, Inc. v. Grisham & Lawless, P.A., 2008-NMSC-038, 144 N.M. 424, 188 P.3d 1175 (2008).

By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956, 33 Fed. R. Serv. 2d 943, 67 A.L.R. Fed. 419 (7th Cir. 1982); Mohave Concrete and Materials, Inc. v. Scaramuzzo, 154 Ariz. 28, 739 P.2d 1345 (Ct. App. Div. 1 1987); Pentz v. Romine, 75 Ark. App. 274, 57 S.W.3d 235 (2001); Blaser v. Cameron, 116 Idaho 453, 776 P.2d 462 (Ct. App. 1989).

Mirchandani v. BMO Harris Bank, N.A., 235 Ariz. 68, 326 P.3d 335 (Ct. App. Div. 1 2014).

Hansen v. Granite County, 2010 MT 107, 356 Mont. 269, 232 P.3d 409 (2010); Holloway v. Holloway, 726 S.E.2d 198 (N.C. Ct. App. 2012); Lewis v. Harding, 182 Ohio App. 3d 588, 2009-Ohio-3071, 913 N.E.2d 1048 (8th Dist. Cuyahoga County 2009).

Fed. R. Civ. P. 13(a)(2)(A).

Fed. R. Civ. P. 13(a)(2)(B).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 4

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Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

I. In General

A. Overview; Definitions

1. Counterclaim

§ 4. Permissive counterclaims

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West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  9

Trial Strategy

[Tactics and Strategy of Pleading](#), 3 Am. Jur. Trials 681

Forms

[Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure §§ 117 to 131](#) (Counterclaims and cross-claims)

Generally, a permissive counterclaim may be thought of as any counterclaim that is not compulsory,¹ or that is an essentially independent action.² Under the Federal Rules of Civil Procedure, a pleading may state as a counterclaim against an opposing party any claim that is not compulsory.³ Thus, unlike a compulsory counterclaim, a permissive counterclaim need not arise out of the transaction or occurrence that is the subject of the plaintiff's claim.⁴ Counterclaims are not compulsory, where: (1) they do not arise out of the same transaction or occurrence as the original action; (2) the sole connection between the counterclaims

and the claims in the complaint is too tenuous to justify compulsory adjudication of all claims in a single lawsuit; and (3) the plaintiffs' claims and the counterclaims raise divergent factual and legal issues and are governed by different bodies of law.⁵

Observation:

The legislative policy of the rule concerning permissive counterclaims is to encourage counterclaims as a matter of judicial economy.⁶ Once a defendant has raised permissive counterclaims in response to the plaintiff's action, these claims become part of the underlying case.⁷

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Footnotes

- 1 [G & M Tire Co. v. Dunlop Tire & Rubber Corp.](#), 36 F.R.D. 440, 9 Fed. R. Serv. 2d 13A.11, Case 3 (N.D. Miss. 1964); [Industrial Equipment & Marine Services, Inc. v. M/V Mr. Gus](#), 333 F. Supp. 578 (S.D. Tex. 1971). As to compulsory counterclaims, see § 3.
- 2 [Gutor Intern. AG v. Raymond Packer Co., Inc.](#), 493 F.2d 938, 18 Fed. R. Serv. 2d 689, 14 U.C.C. Rep. Serv. 567 (1st Cir. 1974); [Big Cola Corp. v. World Bottling Co., Limited](#), 134 F.2d 718 (C.C.A. 6th Cir. 1943). As to the effect of the pendency of another action for the same cause, see § 15. As to the requirement that a permissive counterclaim must allege or be based on an independent source of jurisdiction, see § 97.
- 3 [Fed. R. Civ. P. 13\(b\)](#).
- 4 [West Coast Tanneries, Limited v. Anglo-American Hides Co.](#), 20 F.R.D. 166 (S.D. N.Y. 1957); [Bisson v. Eck](#), 430 Mass. 406, 720 N.E.2d 784, 40 U.C.C. Rep. Serv. 2d 333 (1999); [Atlas Supply, Inc. v. Realm, Inc.](#), 170 Wash. App. 234, 287 P.3d 606 (Div. 1 2012).
Counterclaims of the intervenor successor in interest, that it had a right to the land equipment in the retailers' possession and that its brand equity was being diminished by the retailers' actions, did not arise out of the same transaction or occurrence as the retailers' primary claim against the franchisor regarding fair notice to the franchisees, a good faith reason for termination by the franchisor, and of nondiscriminatory offers, and thus were permissive. [Santiago-Sepulveda v. Esso Standard Oil Co. \(Puerto Rico\), Inc.](#), 256 F.R.D. 39 (D.P.R. 2009).
- 5 [Chemtech Industries, Inc. v. Goldman Financial Group, Inc.](#), 156 F.R.D. 181, 30 Fed. R. Serv. 3d 634 (E.D. Mo. 1994).
- 6 [Alaska Barite Co. v. Freighters Inc.](#), 54 F.R.D. 192, 15 Fed. R. Serv. 2d 1507 (N.D. Cal. 1972); [American Car & Foundry Inv. Corporation v. Chandler-Groves Co.](#), 2 F.R.D. 85 (E.D. Mich. 1941); [Brown Paper Mill Co. v. Agar Mfg. Corporation](#), 1 F.R.D. 579 (S.D. N.Y. 1941).
- 7 [PGR Management Co., Inc. v. Credle](#), 427 Mass. 636, 694 N.E.2d 1273 (1998).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 5

American Jurisprudence, Second Edition | May 2021 Update

Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

I. In General

A. Overview; Definitions

2. Recoupment and Setoff

§ 5. Recoupment or reconvention

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  6

Recoupment, or reconvention as it is called in civil law jurisdictions, refers to the defendant's right, in the same action, to reduce or eliminate the plaintiff's claim, either because the plaintiff has not complied with some cross-obligation of the contract on which he or she sues or because the plaintiff has violated some legal duty in the making or performance of that contract.¹ Stated otherwise, recoupment allows a defendant to defend against a claim by asserting, up to the amount of the claim, the defendant's own claim against the plaintiff growing out of the same transaction.² Thus, recoupment is a doctrine of an intrinsically defensive nature.³

Caution:

As a defense, recoupment cannot be used to obtain affirmative relief.⁴ Moreover, recoupment applies only by way of reduction, mitigation, or abatement of damages claimed by the plaintiff and is not an independent action.⁵

Recoupment rests upon the principle that it is just and equitable to settle in one action all claims growing out of the same contract or transaction; the object of the plea is to rebate or recoup, in whole or part, the claim sued on.⁶ The fundamental purpose of the affirmative defense of recoupment is the examination of a transaction in all its aspects to achieve a just result.⁷ The practice serves to avoid needless delay and unnecessary litigation.⁸

The defense of recoupment is not a counterclaim or setoff,⁹ and therefore is not affected by a statute of limitations.¹⁰ Thus, a party may assert a claim for equitable recoupment, even though a timely counterclaim has not or cannot be filed.¹¹

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Footnotes

- 1 [Distribution Services, Ltd. v. Eddie Parker Interests, Inc.](#), 897 F.2d 811 (5th Cir. 1990); [Inniss v. Methot Buick-Opel, Inc.](#), 506 A.2d 212, 1 U.C.C. Rep. Serv. 2d 456 (Me. 1986); [Mudge v. Macomb County](#), 458 Mich. 87, 580 N.W.2d 845 (1998); [RPM Plumbing Mechanical, Inc. v. Jim Plunkett, Inc.](#), 46 S.W.3d 60 (Mo. Ct. App. W.D. 2001); [Hathorn v. Loftus](#), 143 N.H. 304, 726 A.2d 1278, 37 U.C.C. Rep. Serv. 2d 676 (1999). "Recoupment" is the right of a defendant to have a deduction from the amount of the plaintiff's damages for the reason that the plaintiff has not complied with cross-obligations or independent covenants arising under same contract. [In re American Remanufacturers, Inc.](#), 451 B.R. 349 (Bankr. D. Del. 2011) (applying Tennessee law).
- 2 [F.D.I.C. v. Kooyomjian](#), 220 F.3d 10 (1st Cir. 2000); [RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC](#), 754 F.3d 380 (6th Cir. 2014); [Bank of the West v. Kline](#), 782 N.W.2d 453 (Iowa 2010).
A "recoupment" is a reduction or rebate by the defendant of part of the plaintiff's claim because of a right in the defendant arising out of the same transaction. [Modern Management Co. v. Wilson](#), 997 A.2d 37 (D.C. 2010).
- 3 [Mudge v. Macomb County](#), 458 Mich. 87, 580 N.W.2d 845 (1998); [Kaiser by Taylor v. Monitrend Inv. Management, Inc.](#), 672 A.2d 359 (Pa. Commw. Ct. 1996).
Recoupment may be asserted as a purely defensive matter going only to the reduction or satisfaction of a plaintiff's breach of contract claim. [Citibank \(South Dakota\), N.A. v. Mincks](#), 135 S.W.3d 545 (Mo. Ct. App. S.D. 2004).
- 4 [Kelly v. Deutsche Bank Nat. Trust Co.](#), 789 F. Supp. 2d 262 (D. Mass. 2011) (applying Massachusetts law); [In re McClendon](#), 488 B.R. 876 (Bankr. E.D. N.C. 2013); [Loricco v. Pantani](#), 67 Conn. App. 681, 789 A.2d 514 (2002); [Enrico & Sons Contracting, Inc. v. Bridgemarket Associates](#), 252 A.D.2d 429, 675 N.Y.S.2d 351 (1st Dep't 1998); [Minex Resources, Inc. v. Morland](#), 467 N.W.2d 691 (N.D. 1991); [CitiMortgage, Inc. v. Hoge](#), 196 Ohio App. 3d 40, 2011-Ohio-3839, 962 N.E.2d 327 (8th Dist. Cuyahoga County 2011).
The affirmative defense of recoupment is a claim of right to reduce the amount demanded and can be had only to an extent sufficient to satisfy the plaintiff's claim. [Haddad v. English](#), 145 Ohio App. 3d 598, 763 N.E.2d 1199 (9th Dist. Medina County 2001).
- 5 [Stanley v. Clark](#), 159 F. Supp. 65 (D.N.H. 1957); [Minex Resources, Inc. v. Morland](#), 467 N.W.2d 691 (N.D. 1991); [Villa v. Hedge](#), 96 R.I. 52, 188 A.2d 904 (1963).
- 6 [Boone Nat. Sav. & Loan Ass'n, F.A. v. Crouch](#), 47 S.W.3d 371 (Mo. 2001).
- 7 [Associates Home Equity Services, Inc. v. Troup](#), 343 N.J. Super. 254, 778 A.2d 529 (App. Div. 2001).
- 8 [Fadner v. Commissioner of Revenue Services](#), 281 Conn. 719, 917 A.2d 540 (2007); [Lofchie v. Washington Square Ltd. Partnership](#), 580 A.2d 665 (D.C. 1990).
The purpose of the equitable recoupment doctrine is to preclude unjust enrichment of a party to a lawsuit and to avoid wasteful multiplicity of litigation. [Estate v. Orenstein v. C.I.R.](#), T.C. Memo. 2000-150, T.C.M. (RIA) P 2000-150 (2000).
- 9 [Minex Resources, Inc. v. Morland](#), 467 N.W.2d 691 (N.D. 1991); [Kline v. Blue Shield of Pennsylvania](#), 383 Pa. Super. 347, 556 A.2d 1365 (1989).

- 10 [Loricco v. Pantani](#), 67 Conn. App. 681, 789 A.2d 514 (2002); [Minex Resources, Inc. v. Morland](#), 467 N.W.2d 691 (N.D. 1991); [Kline v. Blue Shield of Pennsylvania](#), 383 Pa. Super. 347, 556 A.2d 1365 (1989).
As an equitable concept, judges invented the doctrine of equitable recoupment in order to avoid an unusually harsh or egregious result from a strict application of a statute of limitations. [Associates Home Equity Services, Inc. v. Troup](#), 343 N.J. Super. 254, 778 A.2d 529 (App. Div. 2001).
Recoupment is similar to offset and is utilized to allow a defendant to assert a counterclaim otherwise barred by the statute of limitations, where the parties' claims arise from the same transaction. [Collard v. Nagle Const., Inc.](#), 2002 UT App 306, 57 P.3d 603 (Utah Ct. App. 2002).
- 11 [Town of Amherst v. County of Erie](#), 247 A.D.2d 869, 668 N.Y.S.2d 848 (4th Dep't 1998).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 6

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Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

I. In General

A. Overview; Definitions

2. Recoupment and Setoff

§ 6. Setoff or compensation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  7, 8(1), 8(2)

The doctrine of setoff, or compensation as it is called in civil law jurisdictions, is essentially an equitable one,¹ requiring that the demands of mutually indebted parties be set off against each other and that only the balance be recovered in a judicial proceeding by one party against the other.² Stated otherwise, the right of setoff allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A.³ It is a mode that equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it.⁴

Observation:

Setoff is often justified when a plaintiff owes a debt to an insolvent party and will be forced to pay off that debt without being allowed to recover a debt the insolvent party may owe to the plaintiff.⁵

Statutes or rules now provide for setoff in most jurisdictions.⁶ Such statutes or rules are to be liberally construed.⁷

The right to setoff does not operate as a denial of the plaintiff's claim, but rather allows the defendant to set off the debt that the plaintiff owes the defendant against the plaintiff's claim against the defendant. As such, it must be asserted as a counterclaim rather than a defense.⁸ Although setoff may be used to offset a plaintiff's claim, it may not be used to recover affirmatively.⁹ A setoff is a reduction from an amount otherwise owed, therefore, and cannot result in a net recovery in favor of the party asserting the defense of setoff.¹⁰

Caution:

Due to its equitable origin,¹¹ the right to setoff is not absolute,¹² and may be restricted by judicial limitations imposed to uphold a state policy protecting debtors.¹³ Moreover, a party may waive the statutory right of setoff under appropriate circumstances.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Right of setoff is not a security interest. [In re Cruz Rivera](#), 600 B.R. 132 (B.A.P. 1st Cir. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [In re Fruehauf Trailer Corp.](#), 414 B.R. 36 (Bankr. D. Del. 2009); [In re Marriage of Ballstaedt](#), 606 N.W.2d 345 (Iowa 2000); [Firststar Eagan Bank, N.A. v. Marquette Bank Minneapolis, N.A.](#), 466 N.W.2d 8, 13 U.C.C. Rep. Serv. 2d 1302 (Minn. Ct. App. 1991); [Stewart Title Guar. Co. v. Community Title Co.](#), 924 S.W.2d 62 (Mo. Ct. App. E.D. 1996); [Jordet v. Jordet](#), 2012 ND 231, 823 N.W.2d 512 (N.D. 2012).
Setoff is a right grounded in concepts of fairness and equity. [In re Myers](#), 362 F.3d 667 (10th Cir. 2004). Absent a statutory mandate authorizing setoff in a particular circumstance, setoff is a matter in equity. [Walker v. Farmers Ins. Exchange](#), 226 Mich. App. 75, 572 N.W.2d 17 (1997).
- 2 [In re Braniff Airways, Inc.](#), 42 B.R. 443 (Bankr. N.D. Tex. 1984); [Jess v. Herrmann](#), 26 Cal. 3d 131, 161 Cal. Rptr. 87, 604 P.2d 208 (1979); [International Equipment Service, Inc. v. Pocatello Indus. Park Co.](#), 107 Idaho 1116, 695 P.2d 1255 (1985); [In re Marriage of Ballstaedt](#), 606 N.W.2d 345 (Iowa 2000); [American Bank v. Saxena](#), 553 So. 2d 836 (La. 1989).
- 3 [Westinghouse Credit Corp. v. D'Urso](#), 278 F.3d 138 (2d Cir. 2002) (applying New York law); [In re SemCrude, L.P.](#), 399 B.R. 388 (Bankr. D. Del. 2009), [aff'd](#), 428 B.R. 590 (D. Del. 2010); [Mariculture Products Ltd. v. Those Certain Underwriters at Lloyd's of London Individually Subscribing to Certificate No. 1395/91](#), 84 Conn. App. 688, 854 A.2d 1100 (2004); [In re Liquidation of Home Ins. Co.](#), 158 N.H. 677, 972 A.2d 1019 (2009); [Pisane v. Feig](#), 41 Misc. 3d 216, 970 N.Y.S.2d 363 (Sup 2013); [Triangle Properties, Inc. v. Homewood Corp.](#), 2013-Ohio-3926, 3 N.E.3d 241 (Ohio Ct. App. 10th Dist. Franklin County 2013).
- 4 [People v. American Sur. Co. of New York](#), 241 A.D. 199, 272 N.Y.S. 2 (3d Dep't 1934), [aff'd](#), 266 N.Y. 585, 195 N.E. 212 (1935).

5 *Adams v. Zimmerman*, 73 F.3d 1164 (1st Cir. 1996).
6 *Scroggins v. Alabama Gas Corp.*, 275 Ala. 650, 158 So. 2d 90 (1963); *State v. Weatherby*, 344 Mo. 848,
 129 S.W.2d 887 (1939).
7 *Weinstein v. Rhorer*, 255 Ky. 179, 73 S.W.2d 25 (1934); *Griffin v. Scott*, 203 S.C. 430, 27 S.E.2d 570 (1943);
 Walters v. Munson, 176 Wash. 469, 30 P.2d 224 (1934).
8 *National City Bank of Rome v. Busbin*, 175 Ga. App. 103, 332 S.E.2d 678 (1985).
9 *Rogue River Management Co. v. Shaw*, 243 Or. 54, 411 P.2d 440 (1966).
 A defendant may not obtain an award of affirmative relief against a plaintiff by way of a setoff against a
 demand for money; rather, the defendant may only assert the setoff defensively to defeat the plaintiff's claim
 in whole or in part. *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.*, 29 Cal. 4th 189, 126
 Cal. Rptr. 2d 908, 57 P.3d 372 (2002), as modified on other grounds, (Nov. 14, 2002).
10 *Norwalk Cove Marina, Inc. v. S/V ODYSSEUS*, 64 Fed. Appx. 319 (2d Cir. 2003).
11 *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 177 Cal. Rptr. 803 (1st Dist. 1981); *Hogren v.*
 Schlueter, 355 N.W.2d 762 (Minn. Ct. App. 1984).
12 *Wm. R. Clarke Corp. v. Safeco Ins. Co. of America*, 78 Cal. App. 4th 355, 92 Cal. Rptr. 2d 709 (2d Dist.
 2000); *Hogren v. Schlueter*, 355 N.W.2d 762 (Minn. Ct. App. 1984).
 The right of setoff is permissive, not mandatory, and its application rests in the discretion of the court, which
 exercises such discretion under the general principles of equity. *Newbery Corp. v. Fireman's Fund Ins. Co.*,
 95 F.3d 1392 (9th Cir. 1996).
 A setoff must not prejudice intervening rights. *Mynatt v. Collis*, 274 Kan. 850, 57 P.3d 513 (2002).
13 *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 177 Cal. Rptr. 803 (1st Dist. 1981); *Hogren v.*
 Schlueter, 355 N.W.2d 762 (Minn. Ct. App. 1984).
 An equitable setoff will not be upheld on appeal where it contradicts public policy. *Mynatt v. Collis*, 274
 Kan. 850, 57 P.3d 513 (2002).
14 § 12.

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Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

I. In General

A. Overview; Definitions

2. Recoupment and Setoff

§ 7. Setoff or compensation—Independent nature of claim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  7, 8(1), 8(2), 24

The remedy of setoff is similar to a counterclaim in having the nature and effect of an independent action by the defendant against the plaintiff.¹ Generally, a setoff must rest on a claim enforceable in its own right.² Thus, an obligation that is not enforceable in an action at law cannot be set off against an opposing claim.³

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Footnotes

- ¹ [Flying Tiger Line, Inc. v. U. S.](#), 145 Ct. Cl. 1, 170 F. Supp. 422 (1959); [Arimizu v. Financial Sec. Ins. Co., Inc.](#), 5 Haw. App. 106, 679 P.2d 627 (1984); [Jorge Const. Co. v. Weigel Excavating and Grading Co. Corp.](#), 343 N.W.2d 439 (Iowa 1984); [Gibson v. City of St. Louis](#), 349 S.W.3d 460 (Mo. Ct. App. E.D. 2011); [Sarkeys v. Marlow](#), 1951 OK 195, 205 Okla. 15, 235 P.2d 676 (1951).
- As a general rule, a setoff, counterclaim, or cross-claim has the nature, characteristics, and effect of an independent action or suit by one party against another. [Mynatt v. Collis](#), 274 Kan. 850, 57 P.3d 513 (2002).
- ² [Budge v. Post](#), 544 F. Supp. 370 (N.D. Tex. 1982); [R. M. Sherman Co. v. W. R. Thomason, Inc.](#), 191 Cal. App. 3d 559, 236 Cal. Rptr. 577 (1st Dist. 1987).
- ³ [R. M. Sherman Co. v. W. R. Thomason, Inc.](#), 191 Cal. App. 3d 559, 236 Cal. Rptr. 577 (1st Dist. 1987); [Kocsorak v. Cleveland Trust Co.](#), 151 Ohio St. 212, 39 Ohio Op. 36, 85 N.E.2d 96 (1949); [In re Kenin's Estate](#), 346 Pa. 127, 29 A.2d 495 (1943).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. I B Refs.

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Counterclaim, Recoupment, and Setoff

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I. In General

B. Availability and Application of Remedy

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  [2](#), [5](#), [8\(1\)](#), [8\(2\)](#), [11](#), [21](#), [58](#)

A.L.R. Library

A.L.R. Index, Counterclaim, Recoupment, and Setoff

A.L.R. Index, Pleadings

West's A.L.R. Digest, [Set-off and Counterclaim](#)  [2](#), [5](#), [8\(1\)](#), [8\(2\)](#), [11](#), [21](#), [58](#)

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 8

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Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

I. In General

B. Availability and Application of Remedy

§ 8. Generally; existence of plaintiff's cause of action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  5, 11

The availability of counterclaim, setoff, or recoupment depends on the nature of the original or principal action,¹ the nature and status of the claim asserted,² and the relationship of the counterclaim, setoff, or recoupment to the plaintiff's action.³

A setoff is not available when the plaintiff has no cause of action.⁴ Likewise, a counterclaim is not available when the plaintiff has no right of action against the defendant,⁵ since a counterclaim presupposes a claim against the party filing the counterclaim.⁶ However, if there is an independent jurisdictional basis for the counterclaim and if the counterclaimant seeks affirmative relief, the counterclaim is sustainable without regard to what happens to the original complaint.⁷

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Footnotes

- ¹ §§ 13 to 18.
- ² §§ 19 to 25.
- ³ §§ 26 to 38.
- ⁴ *Davis v. Evans*, 261 Ala. 548, 74 So. 2d 705, 48 A.L.R.2d 740 (1954).
- ⁵ *Matter of Estate of Kidd*, 812 S.W.2d 356 (Tex. App. Amarillo 1991), writ denied, (Nov. 20, 1991) (holding that the counterclaim of an independent executor of a decedent's estate was properly dismissed upon the nonsuit of the principal case, because the counterclaim only duplicated the controlling issues of the will contest and resisted the beneficiary's right to relief).
- ⁶ § 1.
- ⁷ *Isenberg v. Biddle*, 125 F.2d 741 (App. D.C. 1941); *Edmunds v. Lupton*, 253 Md. 93, 252 A.2d 71 (1969).

As to jurisdictional issues with regard to counterclaims, see §§ [95](#) to [100](#).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 9

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Counterclaim, Recoupment, and Setoff

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I. In General

B. Availability and Application of Remedy

§ 9. Extinguishment of mutual debts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  5, 58

The common law does not recognize the civil law doctrine of compensation and extinguishment of mutual debts by mere operation of law.¹ Generally, therefore, in the absence of a statutory provision to the contrary, liquidated mutual debts do not alone extinguish themselves and do not cancel one another without the mutual assent of judicial action.² The rationale is that a debtor who is a creditor to the extent of his or her demand has the right to direct and control the disposition that will be made of his or her debt and to apply or not apply the debt to the payment of demands that he or she owes.³

Caution:

Under another view, however, a recovery by one of two opposing parties suing on the same contract would necessarily be an offset, at least to the extent of the recovery by the other.⁴

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Footnotes

- 1 Jackson v. Farmers Union Livestock Com'n, 238 Mo. App. 449, 181 S.W.2d 211 (1944).
2 Four-G Corp. v. Ruta, 45 N.J. Super. 128, 131 A.2d 566 (App. Div. 1957), judgment rev'd on other grounds,
25 N.J. 503, 138 A.2d 18 (1958); In re General Assignment for Benefit of Creditors of Tiffany Lingerie,
Inc., 28 Misc. 2d 96, 208 N.Y.S.2d 471 (Sup 1960).
3 Four-G Corp. v. Ruta, 45 N.J. Super. 128, 131 A.2d 566 (App. Div. 1957), judgment rev'd on other grounds,
25 N.J. 503, 138 A.2d 18 (1958).
4 Burns v. Gulf Oil Corp., 246 N.C. 266, 98 S.E.2d 339 (1957).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 10

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Counterclaim, Recoupment, and Setoff

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I. In General

B. Availability and Application of Remedy

§ 10. What law governs

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  2

Under some authority, the law of the forum determines whether a defendant's claim may be pleaded by way of setoff or counterclaim.¹ However, it has also been found that the plaintiff's right to choose the forum in which it wants to bring an action does not allow the plaintiff to control the choice of law to be applied to counterclaims against it,² and that the nature, existence, and enforceability of claims sought to be setoff are determined by applying the law of the state where the operative facts occurred.³

Observation:

In determining which state's law to apply in a case involving contribution and setoff, the contacts between the individual states should not be mechanically counted; the conflict between the states' laws should be resolved rationally, based on the interests and policies of each state.⁴

Footnotes

- 1 [Gerald v. Foster](#), 251 Miss. 63, 168 So. 2d 518 (1964); [State Nat. Bank of El Paso, Tex. v. Cantrell](#), 1943-NMSC-028, 47 N.M. 389, 143 P.2d 592, 152 A.L.R. 1216 (1943).
- 2 [Continental Cablevision, Inc. v. Storer Broadcasting Co.](#), 653 F. Supp. 451 (D. Mass. 1986).
- 3 [Matter of GEC Industries, Inc.](#), 128 B.R. 892, 15 U.C.C. Rep. Serv. 2d 845 (Bankr. D. Del. 1991).
- 4 [Barringer v. State](#), 111 Idaho 794, 727 P.2d 1222 (1986).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 11

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I. In General

B. Availability and Application of Remedy

§ 11. Equitable relief

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  8(1), 8(2)

A court has inherent equitable power to allow or compel a setoff¹ whenever equity and justice so demand.² The right of setoff itself is essentially an equitable right,³ which courts may enforce at their discretion.⁴ Given the equitable nature of setoff, in permitting a setoff, the court may calculate the setoff in the way it deems most equitable.⁵

The equitable power of setoff would exist without statutes allowing setoff and is not affected by their repeal.⁶ Thus, equitable setoff may be enforced independently of setoff statutes,⁷ if, from the nature of the claim or the situation of the parties, it is impossible to obtain justice by plea or cross action.⁸ This occurs when the defendant, through no fault of his or her own, has no adequate remedy at law.⁹

Observation:

Special circumstances allowing setoff under independent equity jurisdiction include insolvency,¹⁰ fraud,¹¹ and the nonresidence of the plaintiff in an action.¹²

Footnotes

- 1 Bryant Bros. v. Wilson, 253 Ky. 578, 69 S.W.2d 1020 (1934); Chaney v. Cooper, 948 S.W.2d 621 (Mo. Ct. App. W.D. 1997); Scarano v. Scarano, 132 N.J. Eq. 362, 28 A.2d 425 (Ch. 1942).
The right to setoff exists independently of statute and rests upon the court's inherent power to do justice to the parties before it. Keith G. v. Suzanne H., 62 Cal. App. 4th 853, 72 Cal. Rptr. 2d 525 (2d Dist. 1998), as supplemented on denial of reh'g, (Apr. 8, 1998).
- 2 Atchison County Farmers Union Co-op Ass'n v. Turnbull, 241 Kan. 357, 736 P.2d 917 (1987).
- 3 § 6.
- 4 Newbery Corp. v. Fireman's Fund Ins. Co., 95 F.3d 1392 (9th Cir. 1996); Mynatt v. Collis, 274 Kan. 850, 57 P.3d 513 (2002); Junak v. John, 420 N.W.2d 668 (Minn. Ct. App. 1988); Lake Mary Ltd. Partnership v. Johnston, 145 N.C. App. 525, 551 S.E.2d 546 (2001); Jordet v. Jordet, 2012 ND 231, 823 N.W.2d 512 (N.D. 2012); Ultra Resources, Inc. v. Hartman, 2010 WY 36, 226 P.3d 889 (Wyo. 2010).
- 5 In re Fruehauf Trailer Corp., 414 B.R. 36 (Bankr. D. Del. 2009).
- 6 Messick v. Rardin, 6 F. Supp. 200 (E.D. Ill. 1934); Siegel v. State, 262 A.D. 388, 28 N.Y.S.2d 958 (3d Dep't 1941).
A setoff is not necessarily founded upon any statute or fixed rule of court but grows out of the inherent equitable jurisdiction of the court. Lake Mary Ltd. Partnership v. Johnston, 145 N.C. App. 525, 551 S.E.2d 546 (2001).
- 7 Croall v. Kohler, 106 Conn. App. 788, 943 A.2d 1112 (2008); Willis v. Fidelity & Deposit Co. of Md., 345 Ill. App. 373, 103 N.E.2d 513 (1st Dist. 1952); Bryant Bros. v. Wilson, 253 Ky. 578, 69 S.W.2d 1020 (1934); Sturdivant Bank v. Stoddard County, 332 Mo. 568, 58 S.W.2d 702 (1933).
- 8 Shannon v. Sutherland, 74 F.2d 530, 97 A.L.R. 583 (C.C.A. 4th Cir. 1935); Hutchinson Coal Co. v. Miller, 20 F. Supp. 718 (N.D. W. Va. 1937); Reichlin v. First Nat. Bank, 184 Wash. 304, 51 P.2d 380 (1935).
- 9 Hutchinson Coal Co. v. Miller, 20 F. Supp. 718 (N.D. W. Va. 1937); Dudley v. Whatley, 244 Ala. 508, 14 So. 2d 141, 147 A.L.R. 508 (1943).
- 10 Walter E. Heller & Co. v. Lindsey, 146 Colo. 452, 361 P.2d 979 (1961); McLendon v. Galloway, 216 Ga. 261, 116 S.E.2d 208 (1960); Barnhouse v. Hawkeye State Bank, 406 N.W.2d 181, 4 U.C.C. Rep. Serv. 2d 1304 (Iowa 1987); Contrail Leasing Partners, Ltd. v. Executive Service Corp., 100 Nev. 545, 688 P.2d 765, 40 U.C.C. Rep. Serv. 161 (1984); Jones v. England, 1989 OK 142, 782 P.2d 119 (Okla. 1989).
As to insolvency as grounds for the setoff of an unliquidated demand, see § 20.
- 11 Advance Indus. Finance Co. v. Western Equities, Inc., 173 Cal. App. 2d 420, 343 P.2d 408 (2d Dist. 1959).
- 12 U.S. v. National City Bank of New York, 83 F.2d 236, 106 A.L.R. 1235 (C.C.A. 2d Cir. 1936); Gordy Tire Co. v. Dayton Rubber Co., 216 Ga. 83, 114 S.E.2d 529 (1960).

20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 12

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Counterclaim, Recoupment, and Setoff

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I. In General

B. Availability and Application of Remedy

§ 12. Estoppel; waiver by contract or conduct

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  21

A.L.R. Library

[Waiver or estoppel with respect to debtor's assertion, as setoff or counterclaim against assignee, of claim valid as against assignor, 51 A.L.R.2d 886](#)

Forms

[Am. Jur. Legal Forms 2d § 76:3](#) (Agreement to waive setoffs and counterclaims)

[Am. Jur. Legal Forms 2d §§ 76:4 to 76:6](#) (Contract clause waiving setoffs and counterclaims)

A party may agree to waive the right to interpose a counterclaim or setoff.¹ However, a covenant that unreasonably restricts the privilege of litigating an issue in a court of law, or that unreasonably restricts the jurisdiction of a federal court, is illegal.² Furthermore, a contractual waiver agreement will not bar a viable counterclaim or setoff sounding in fraud.³

Observation:

The common-law right to setoff is not surrendered absent specific language.⁴ Thus, to constitute a waiver of setoff, the contractual language must be specific and precise in explaining the parties' intent to preclude setoff.⁵ Moreover, a waiver-of-defense clause stating that there will be no "offset" is not as broad as a waiver of all defenses.⁶

Waiver of the right of counterclaim or setoff may be implied from a party's conduct.⁷ However, the failure to assert a counterclaim in a prior action between the same parties does not preclude a counterclaim in a subsequent action, if the prior action was dismissed on a stipulation reserving the claim.⁸

Caution:

A party may be estopped by his or her improper conduct from insisting on a counterclaim or setoff.⁹

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Footnotes

- 1 [In re Ullico Inc. Litigation](#), 605 F. Supp. 2d 210 (D.D.C. 2009) (holding that setoff may be precluded by agreement); [ITS Financial, LLC v. Advent Financial Services, LLC](#), 823 F. Supp. 2d 758 (S.D. Ohio 2011) (applying Missouri law; finding that a promissory note barred the defense of setoff); [Loader Leasing Corp. v. Kearns](#), 83 F.R.D. 202 (W.D. Pa. 1979); [Jess v. Herrmann](#), 26 Cal. 3d 131, 161 Cal. Rptr. 87, 604 P.2d 208 (1979).
The right of setoff may be waived. [Solid Waste Management Authority of Crisp County v. Transwaste Services, Inc.](#), 247 Ga. App. 29, 543 S.E.2d 98 (2000).
- 2 [Loader Leasing Corp. v. Kearns](#), 83 F.R.D. 202 (W.D. Pa. 1979) (holding that a contractual provision waiving the right to assert a counterclaim is inapplicable and unenforceable with respect to compulsory counterclaims in a federal forum).
A provision in a lease agreement purporting to waive the tenant's right to assert compulsory counterclaims in response to an action by the landlord for breach of the agreement was unenforceable; the tenant's failure to assert its compulsory counterclaims would have resulted in its being precluded from raising such claims in any subsequent action. [Beach Co. v. Twillman, Ltd.](#), 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002).
- 3 [Federal Deposit Ins. Corp. v. Borne](#), 599 F. Supp. 891, 40 U.C.C. Rep. Serv. 1753 (E.D. N.Y. 1984).
- 4 [Local Oklahoma Bank, N.A. v. U.S.](#), 59 Fed. Cl. 713 (2004), opinion aff'd, 452 F.3d 1371 (Fed. Cir. 2006).

5 In re Ullico Inc. Litigation, 605 F. Supp. 2d 210 (D.D.C. 2009).
6 Dakota Partners, L.L.P. v. Glopak, Inc., 2001 ND 168, 634 N.W.2d 520 (N.D. 2001).
7 Hoffman v. Gleason, 107 F.2d 101 (C.C.A. 6th Cir. 1940); Security State Bank of Great Bend v. Midwest
 Foundry, 177 Kan. 151, 277 P.2d 629, 51 A.L.R.2d 882 (1954); Northwestern Nat. Bank v. Commonwealth,
 345 Pa. 192, 27 A.2d 20 (1942).
8 Landers v. Smith, 379 S.W.2d 884 (Mo. Ct. App. 1964).
9 Matter of T & B General Contracting, Inc., 833 F.2d 1455 (11th Cir. 1987).
 A long-term disability trust was estopped from asserting that it was entitled to offset the full amount received
 by a disabled employee from his employer through the redemption of the employee's workers' compensation
 claim, where at the time the employee redeemed the claim, the employer assured him that the amounts would
 not be offset against any benefits received from the disability plan, and the employee received the same
 assurances from the employer's head analyst, who claimed to be speaking on behalf of the disability trust.
 Ombrello v. Montgomery Ward Long Term Disability Trust, 163 Mich. App. 816, 415 N.W.2d 658 (1987).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. II A Refs.

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II. Actions and Claims in Which Remedy Lies

A. In General

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  [13](#), [24](#), [26](#), [39](#)

A.L.R. Library

A.L.R. Index, Counterclaim, Recoupment, and Setoff

A.L.R. Index, Pleadings

West's A.L.R. Digest, [Set-off and Counterclaim](#)  [13](#), [24](#), [26](#), [39](#)

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II. Actions and Claims in Which Remedy Lies

A. In General

1. Overview

§ 13. Actions in which remedy lies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  13

Under some authority, the defendant may file a counterclaim in an action for the recovery of money only,¹ and setoff is not available in an action in which a money demand is not sought.² A setoff or counterclaim may be available in a possessory action only when special circumstances entitle the defendant to equitable relief.³ In other jurisdictions, however, a counterclaim may be asserted in a proceeding that is not only possessory in character, but also contemplates an award of damages.⁴ Thus, for instance, a counterclaim for misrepresentation and fraud concerning a realty purchase contract may be interposed in an unlawful detainer action.⁵ It has also been found that the defense of recoupment is not available to a defendant whose sole effort is to recover personal property and not its value.⁶

Observation:

The substance of the cause of action contained in the allegations of the complaint, rather than the form of action, determines the right of setoff.⁷

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Footnotes

- 1 [Baldwin v. Baldwin](#), 37 Ohio L. Abs. 400, 47 N.E.2d 792 (Ct. App. 9th Dist. Lorain County 1940).
- 2 [Hudson City Contracting Co. v. Jersey City Incinerator Authority](#), 17 N.J. 297, 111 A.2d 385 (1955).
- 3 [Vernon Parts Corp. v. Granite State Mach. Co.](#), 93 N.H. 315, 41 A.2d 605 (1945); [Julian Engineering Co. v. R. J. & C. W. Fletcher, Inc.](#), 194 Tenn. 542, 253 S.W.2d 743 (1952).
- 4 [Federal Land Bank of St. Louis v. Bross](#), 122 S.W.2d 35 (Mo. Ct. App. 1938).
- 5 [White v. District Court of Fourth Judicial Dist. in and for Utah County](#), 120 Utah 173, 232 P.2d 785 (1951).
- 6 [Stein v. Cherry](#), 158 Pa. Super. 329, 44 A.2d 846 (1945).
- 7 [Pink v. Title Guarantee & Trust Co.](#), 274 N.Y. 167, 8 N.E.2d 321 (1937).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 14

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II. Actions and Claims in Which Remedy Lies

A. In General

1. Overview

§ 14. Claims in which remedy lies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  24, 26

Every claim must have a legal or equitable basis to be the subject of recoupment or setoff.¹ A defendant who pleads a setoff occupies substantially the position of a plaintiff and must have a subsisting demand which would afford the subject matter for a cause of action.² As a general rule, therefore, a defendant's claim to be set off against the plaintiff's claim must be capable of being maintained in a suit against the plaintiff at the commencement of the plaintiff's suit.³

A counterclaim should be allowed where the matter raised is so connected with the matter in controversy under the original complaint that its consideration by the court is necessary to a full determination of the rights of the parties as to the matter in controversy.⁴ While a counterclaim may be any cause of action in favor of the defendant,⁵ a counterclaim⁶ or setoff⁷ that would result in a double recovery for the defendant will not be allowed.

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Footnotes

- 1 [Helms v. Citizens Bank of Erwin](#), 20 Tenn. App. 268, 97 S.W.2d 665 (1936).
- 2 [Gibson v. City of St. Louis](#), 349 S.W.3d 460 (Mo. Ct. App. E.D. 2011).
- 3 [Unispec Development Corp. v. Harwood K. Smith & Partners](#), 124 F.R.D. 211 (D. Ariz. 1988).
As to the independent nature of a claim for setoff, generally, see § 7.
- 4 [Allstate Ins. Co. v. Appell](#), 39 Conn. Supp. 85, 468 A.2d 949 (Super. Ct. 1983).
- 5 [Crawford v. Burkey](#), 93 A.D.3d 1134, 941 N.Y.S.2d 338 (3d Dep't 2012).
- 6 [Miller v. Stieglitz](#), 109 N.J.L. 138, 160 A. 543 (N.J. Ct. Err. & App. 1932).

7 [Helms v. Citizens Bank of Erwin, 20 Tenn. App. 268, 97 S.W.2d 665 \(1936\).](#)

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 15

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II. Actions and Claims in Which Remedy Lies

A. In General

2. Action Pending

§ 15. Pendency of another action for same cause

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  39

A.L.R. Library

[Stay of civil proceedings pending determination of action in federal court in same state](#), 56 A.L.R.2d 335

Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff § 58](#) (Notice of motion to strike or for dismissal of counterclaim—Provision—Another action pending between same parties for same cause)

In federal courts, pending litigation on the same cause of action does not affect the ability to plead a permissive counterclaim.¹ Furthermore, the Federal Rules of Civil Procedure provide an express exception to the compulsory counterclaim rule, whereby the pleader need not state the claim if, when the action was commenced, the claim was the subject of another pending action.² Thus, when a cause of action that normally would have to be pleaded as a compulsory counterclaim is the subject of litigation

pending in another court and commenced before the later action, waiver will not result from the failure to counterclaim the cause of action in question.³ In such circumstances, the failing party will not thereafter be barred by res judicata.⁴

Observation:

The pending-litigation exception to the compulsory counterclaim rule prevents one party from compelling another to a cause of action in a court not of the latter's choosing, when the same cause of action is already the subject of pending litigation in another forum that the owner of the cause of action probably chose.⁵

A claim is considered to be the subject of another pending action when presently before an administrative agency.⁶ However, the exception does not apply to pending criminal actions.⁷

In state courts, the pendency of another action for the same cause has been found to preclude the assertion of a counterclaim.⁸ On the other hand, the fact that another action is pending on a claim has been found not to prevent the same claim from being used as a setoff in a subsequent action.⁹

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Footnotes

- 1 [Union Paving Co. v. Downer Corp.](#), 276 F.2d 468 (9th Cir. 1960) (construing Fed. R. Civ. P. 13(b)).
As to permissive counterclaims, generally, see § 4.
- 2 [Fed. R. Civ. P. 13\(a\)\(2\)\(A\)](#).
As to compulsory counterclaims, generally, see § 3.
As to the optional nature of the "another pending action" exception, see § 16.
- 3 [Brown v. McCormick](#), 608 F.2d 410 (10th Cir. 1979).
- 4 [Union Paving Co. v. Downer Corp.](#), 276 F.2d 468 (9th Cir. 1960).
- 5 [Union Paving Co. v. Downer Corp.](#), 276 F.2d 468 (9th Cir. 1960).
- 6 [Bethlehem Steel Co. v. Lykes Bros. S. S. Co.](#), 35 F.R.D. 344, 8 Fed. R. Serv. 2d 13A.13, Case 1 (D. D.C. 1964) (holding that a counterclaim presently before the Maritime Board is the "subject of another pending action" under Fed. R. Civ. P. 13(a)).
- 7 [Woodward v. DiPalermo](#), 98 F.R.D. 621, 36 Fed. R. Serv. 2d 576 (D.D.C. 1983).
- 8 [Fitzpatrick v. Blue Star Auto Stores](#), 312 Ill. App. 184, 37 N.E.2d 928 (1st Dist. 1941); [Fontenot v. Benoit](#), 128 So. 2d 815 (La. Ct. App. 3d Cir. 1961).
The criteria for a compulsory counterclaim are that the claim must arise from the same transaction or occurrence, must not require parties over whom the court may not assert jurisdiction, must not be the subject of a pending action, and must lie against an opposing party. [Noel v. Hall](#), 341 F.3d 1148 (9th Cir. 2003) (applying Washington law).
- 9 [Virginia Mansions Condominium Ass'n v. Lampl](#), 380 Pa. Super. 452, 552 A.2d 275 (1988).

20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 16

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II. Actions and Claims in Which Remedy Lies

A. In General

2. Action Pending

§ 16. Pendency of another action for same cause— Optional nature of "another pending action" exception

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  39

Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff § 58](#) (Notice of motion to strike or for dismissal of counterclaim—Provision—Another action pending between same parties for same cause)

The language of the "another pending action" exception to the compulsory counterclaim rule is permissive rather than mandatory.¹ Hence, a defendant has the option to plead a compulsory counterclaim that is the subject of another pending action.²

A counterclaim can still be treated as compulsory and thus within the court's ancillary jurisdiction, even though it is the subject of another pending action.³ If, however, a pleading is filed in a second action, the pleader must be bound by the final judgment first entered in either action.⁴

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Footnotes

¹ [Union Paving Co. v. Downer Corp.](#), 276 F.2d 468 (9th Cir. 1960) (construing Fed. R. Civ. P. 13(a)).

As to a discussion of the exception, generally, see § 15.

As to compulsory counterclaims, generally, see § 3.

2 H. L. Peterson Co. v. Applewhite, 383 F.2d 430, 11 Fed. R. Serv. 2d 154 (5th Cir. 1967); Fox Chemical Co.
v. Amsoil, Inc., 445 F. Supp. 1355 (D. Minn. 1978); Meadors v. Walter, 58 F.R.D. 634, 17 Fed. R. Serv.
2d 635 (W.D. Pa. 1973).

3 Fox Chemical Co. v. Amsoil, Inc., 445 F. Supp. 1355 (D. Minn. 1978) (finding that the rule does not define
a compulsory counterclaim to be one that has never been asserted before).

4 Hastings v. Seattle-First Nat. Bank, 40 Fed. R. Serv. 2d 669 (M.D. Fla. 1984).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 17

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II. Actions and Claims in Which Remedy Lies

A. In General

2. Action Pending

§ 17. Stay or injunction when other action pending

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  39

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[Propriety Under Circumstances of State Court Injunction Against Nonmatrimonial Action in Court of Sister State](#), 20 A.L.R.6th 211

[Stay of civil proceedings pending determination of action in federal court in same state](#), 56 A.L.R.2d 335

Trial Strategy

[Wrongful Attachment](#), 36 Am. Jur. Proof of Facts 2d 149

When a case brought in one federal district court embraces essentially the same transactions as those in a case pending in another federal district court, the latter court may enjoin the plaintiff in the more recently commenced case from taking any further action in the prosecution of that case.¹ Moreover, when one sued in federal court sues his or her adversary in another federal court on a claim which is a compulsory counterclaim in the first suit, the court in the second case may dismiss the complaint with leave to assert it as a counterclaim in the first suit within a stated time.²

If an opposing party initiates a state court action that is not removed to federal court before the other party commences a federal action, the compulsory counterclaim requirement is eliminated for both parties.³ However, if one sued in state court removes the action to federal court, sues his or her state court adversary in another federal court on a claim which is a compulsory counterclaim in the first suit, and asserts the compulsory counterclaim in the first suit, the second federal court will stay the suit before it pending the outcome of the first suit.⁴

Caution:

The federal procedural rule requiring the bringing of compulsory counterclaims does not provide an exception to the Anti-Injunction Act prohibition against injunctions staying state court actions.⁵ Thus, if a party asserts a claim in a state court that is a compulsory counterclaim in a pending federal action, the federal court cannot enjoin the prosecution of the state proceeding.⁶

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Footnotes

- 1 [National Equipment Rental, Limited v. Fowler](#), 287 F.2d 43, 4 Fed. R. Serv. 2d 167 (2d Cir. 1961).
- 2 [Jepco Corp. v. Greene](#), 171 F. Supp. 66, 2 Fed. R. Serv. 2d 129 (S.D. N.Y. 1959).
- 3 [Trimmel v. General Elec. Credit Corp.](#), 555 F. Supp. 264 (D. Conn. 1983); [Hall v. Kieffer](#), 19 F.R.D. 85 (D.N.D. 1956).
- 4 [Leonard F. Fellman Co. v. Smith-Corona Marchant Inc.](#), 27 F.R.D. 263, 4 Fed. R. Serv. 2d 174 (E.D. Pa. 1961).
- 5 [Gunderson v. ADM Investor Services, Inc.](#), 976 F. Supp. 818 (N.D. Iowa 1997).
As to compulsory counterclaims, generally, see § 3.
- 6 [Carter v. Bedford](#), 420 F. Supp. 927, 24 Fed. R. Serv. 2d 1019 (W.D. Ark. 1976); [Fantecchi v. Gross](#), 158 F. Supp. 684 (E.D. Pa. 1957).

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II. Actions and Claims in Which Remedy Lies

A. In General

2. Action Pending

§ 18. Stay or injunction when other action pending—Prior action terminated before answer

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  39

A.L.R. Library

[Stay of civil proceedings pending determination of action in federal court in same state](#), 56 A.L.R.2d 335

Under some authority, if the earlier action between the parties has been terminated by a consent judgment before the answer was filed, the broad compulsory counterclaim rule should not apply to such an action, which ended with almost no burden on the judicial calendar.¹ There is, however, authority to the contrary.²

In addition, a party who has moved successfully to dismiss an action for failure to state a claim for relief is not barred from subsequently bringing suit against the same opponent on a claim arising out of the same transaction.³ Thus, for instance, the transferee of a mortgage is not barred from bringing an action to foreclose, notwithstanding that the transferee did not assert such claim as a counterclaim in the prior action brought against the transferee by the mortgagor, where the prior action had been dismissed for failure to state a cause of action.⁴

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Footnotes

- 1 [Martino v. McDonald's System, Inc.](#), 598 F.2d 1079, 27 Fed. R. Serv. 2d 501 (7th Cir. 1979) (construing
Fed. R. Civ. P. 13(a)).
- 2 [Dindo v. Whitney](#), 451 F.2d 1 (1st Cir. 1971) (holding that if a party, clearly having had an opportunity to
assert a counterclaim, knew of the existence of the right to a counterclaim, the fact that the original case
was settled and that there was no final judgment on the merits is immaterial, and a bar under [Fed. R. Civ.](#)
[P. 13\(a\)](#) would be appropriate).
- 3 [Lawhorn v. Atlantic Refining Co.](#), 299 F.2d 353, 5 Fed. R. Serv. 2d 87 (5th Cir. 1962).
- 4 [McGruder v. B & L Const. Co., Inc.](#), 331 So. 2d 257 (Ala. 1976).

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II. Actions and Claims in Which Remedy Lies

B. Effect of Status of Claim

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Research References

West's Key Number Digest

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II. Actions and Claims in Which Remedy Lies

B. Effect of Status of Claim

1. Liquidation

§ 19. Liquidated claim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  13, 22(1)

Liquidated claims or demands are generally proper subjects of setoff,¹ recoupment,² or counterclaim.³

A claim is liquidated within the meaning of the setoff statutes when its existence is certain,⁴ and its amount has been determined.⁵ In addition, a claim is liquidated when it is capable of ascertainment by calculation or computation,⁶ in accordance with established market values⁷ or accepted legal standards,⁸ or when the amount due has been fixed by law or agreed on by the parties.⁹

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Footnotes

- ¹ U.S. v. Peterson, 738 F. Supp. 2d 869 (C.D. Ill. 2010); Fluxo-Cane Overseas Ltd. v. E.D. & F. Man Sugar Inc., 599 F. Supp. 2d 639 (D. Md. 2009) (applying New York law); Bonomolo Limousines, Inc. v. Scheuermann, 747 So. 2d 207 (La. Ct. App. 5th Cir. 1999), writ denied, 759 So. 2d 74 (La. 2000); Sveum v. J. Mess Plumbing, Inc., 965 S.W.2d 924 (Mo. Ct. App. E.D. 1998).
- ² Northwestern Nat. Bank v. Commonwealth, 345 Pa. 192, 27 A.2d 20 (1942).
- ³ McCurnin v. B. & J. Realty Co., 11 N.J. Misc. 673, 168 A. 161 (Dist. Ct. 1933); Ferguson v. Plainview Nat. Bank, 42 S.W.2d 834 (Tex. Civ. App. Amarillo 1931).
- ⁴ Arkla, Inc. v. Maddox & May Bros. Casing Service, Inc., 671 So. 2d 1220 (La. Ct. App. 2d Cir. 1996).
The common-law right of setoff applies only where the debts are mutually certain and readily ascertainable. Alden Nursing Center-Lakeland, Inc. v. Patla, 317 Ill. App. 3d 1, 250 Ill. Dec. 907, 739 N.E.2d 904 (1st Dist. 2000).

- 5 Arkla, Inc. v. Maddox & May Bros. Casing Service, Inc., 671 So. 2d 1220 (La. Ct. App. 2d Cir. 1996); Wood
 & Co. v. Sutton, 1936 OK 667, 177 Okla. 631, 61 P.2d 700 (1936).
- 6 Fluxo-Cane Overseas Ltd. v. E.D. & F. Man Sugar Inc., 599 F. Supp. 2d 639 (D. Md. 2009) (applying New
 York law); Arkla, Inc. v. Maddox & May Bros. Casing Service, Inc., 671 So. 2d 1220 (La. Ct. App. 2d
 Cir. 1996).
- 7 Hoffman v. Gleason, 107 F.2d 101 (C.C.A. 6th Cir. 1940).
- 8 Arkla, Inc. v. Maddox & May Bros. Casing Service, Inc., 671 So. 2d 1220 (La. Ct. App. 2d Cir. 1996).
- 9 Wood & Co. v. Sutton, 1936 OK 667, 177 Okla. 631, 61 P.2d 700 (1936).
- A claim is liquidated for the purposes of determining the applicability of compensation, when its correctness
is admitted by the debtor. *Sims v. Hays*, 521 So. 2d 730 (La. Ct. App. 2d Cir. 1988).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 20

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Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

II. Actions and Claims in Which Remedy Lies

B. Effect of Status of Claim

1. Liquidation

§ 20. Unliquidated claim: Setoff

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  16, 20, 35(1), 35(2)

Generally, unliquidated damages cannot be pleaded as a setoff.¹ In other words, there is no right to set off a possible, unliquidated liability against a liquidated claim that is due and payable,² although the parties may agree to set off an unliquidated demand against a liquidated one.³ In some jurisdictions, however, a demand or claim need not be liquidated or ascertainable by calculation in order to be pleaded in setoff.⁴ Under such authority, the existence of an unliquidated setoff, while making the amount of the claim uncertain, does not invalidate the offset, so long as the claims at issue arise out of the same contract or transaction.⁵

Observation:

Some statutes enumerate the types of contracts for which claims need not be liquidated or ascertainable by calculation in order to be the subject of setoff.⁶ Conversely, claims falling outside these types of contract must be for a liquidated or ascertainable amount.⁷

While an unliquidated demand or a debt due at a future time normally cannot be set off in equity against a debt presently due, some jurisdictions allow equitable setoffs of such obligations under special circumstances.⁸ In cases of insolvency, for example, the uncertainty of the amount owed by the respective parties does not prevent the pleading or application of setoff.⁹ The nonresidence of the plaintiff may also be a circumstance that authorizes the setting off of a claim for unliquidated damages,¹⁰ provided that the claim arises from the same transaction on which the plaintiff sues.¹¹

Observation:

If necessary, the court will restrain the enforcement of a demand against which the setoff is to be applied, until the cross-demand can be liquidated.¹²

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Footnotes

- 1 [In re Marriage of Ballstaedt](#), 606 N.W.2d 345 (Iowa 2000); [Webber v. Johnson](#), 342 Mass. 455, 174 N.E.2d 40 (1961); [Howard v. Abernathy](#), 751 S.W.2d 432 (Tenn. Ct. App. 1988); [Johns-Manville Sales Corp. v. Connelly](#), 144 W. Va. 498, 108 S.E.2d 836 (1959).
Setoff is only appropriate when the defendant seeks to reduce the amount of judgment against it by a liquidated debt owed to the defendant by the plaintiff. [ITS Financial, LLC v. Advent Financial Services, LLC](#), 823 F. Supp. 2d 758 (S.D. Ohio 2011) (applying Missouri law).
Setoff is appropriate only when the debts between the parties are liquid and mutual. [Fluxo-Cane Overseas Ltd. v. E.D. & F. Man Sugar Inc.](#), 599 F. Supp. 2d 639 (D. Md. 2009) (applying New York law).
As to a discussion of setoff, generally, see §§ 6, 7.
- 2 [Willett v. Lincolnshire Management, Inc.](#), 302 A.D.2d 271, 756 N.Y.S.2d 9 (1st Dep't 2003).
- 3 [Tolbert v. McSwain](#), 137 S.W.2d 1051 (Tex. Civ. App. El Paso 1939).
- 4 [H.J. McGrath Co. v. Wisner](#), 189 Md. 260, 55 A.2d 793 (1947); [Henderson v. Northwest Airlines](#), 231 Minn. 503, 43 N.W.2d 786 (1950); [Vaillancourt v. Gover](#), 112 Vt. 24, 20 A.2d 122 (1941); [Piland Corp. v. League Const. Co., Inc.](#), 238 Va. 187, 380 S.E.2d 652 (1989).
- 5 [Local Oklahoma Bank, N.A. v. U.S.](#), 59 Fed. Cl. 713 (2004), opinion aff'd, 452 F.3d 1371 (Fed. Cir. 2006).
- 6 [Ryder v. Warren](#), 295 Mass. 24, 3 N.E.2d 221 (1936) (referring to contracts for property sold, money paid, for money had, and received for services performed).
- 7 [Webber v. Johnson](#), 342 Mass. 455, 174 N.E.2d 40 (1961).
- 8 [B-W Acceptance Corp. v. Saluri](#), 258 Iowa 489, 139 N.W.2d 399 (1966); [Atchison County Farmers Union Co-op Ass'n v. Turnbull](#), 241 Kan. 357, 736 P.2d 917 (1987); [Mattek v. Hoffmann](#), 272 Wis. 503, 76 N.W.2d 300, 57 A.L.R.2d 696 (1956).
A court of equity will compel a setoff when mutual demands are held under such circumstances that one of them should be applied against the other and only the balance recovered, and the fact that one of the parties' demands has not been reduced to a judgment is no obstacle to its allowance as a setoff against a judgment. [Plut v. Fireman's Fund Ins. Co.](#), 85 Cal. App. 4th 98, 102 Cal. Rptr. 2d 36, 125 A.L.R.5th 631 (2d Dist. 2000).
As to the setoff of unmaturred or contingent claims, generally, see §§ 23 to 25.

- 9 B-W Acceptance Corp. v. Saluri, 258 Iowa 489, 139 N.W.2d 399 (1966); Atchison County Farmers Union Co-op Ass'n v. Turnbull, 241 Kan. 357, 736 P.2d 917 (1987); Mattek v. Hoffmann, 272 Wis. 503, 76 N.W.2d 300, 57 A.L.R.2d 696 (1956).
- 10 Kortz v. Union Central Life Ins. Co., 264 Ky. 750, 95 S.W.2d 611 (1936).
- 11 Big Four Mills v. Commercial Credit Co., 307 Ky. 612, 211 S.W.2d 831 (1948).
- 12 Hoffman v. Gleason, 107 F.2d 101 (C.C.A. 6th Cir. 1940).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 21

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II. Actions and Claims in Which Remedy Lies

B. Effect of Status of Claim

1. Liquidation

§ 21. Unliquidated claim: Recoupment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  16, 35(1), 35(2)

Although unliquidated damages cannot ordinarily be the subject of setoff,¹ a total or partial failure of consideration immediately connected with the cause of action, or any equitable defense arising out of the same transaction, may be allowed in mitigation of damages or recoupment for the purpose of defeating the plaintiff's action in whole or in part and to avoid circuity of action.² Thus, unliquidated damages that arise out of the contract or transaction on which the plaintiff's action is based may be used in recoupment.³ In fact, recoupment is the right to set off unliquidated damages.⁴

Observation:

Because the recoupment defense arises out of the same transaction, the defendant can raise the defense even if the offsetting debts are not liquidated and even if the claim on which the recoupment defense is based would otherwise have been barred by the statute of limitations.⁵

Footnotes

- 1 § 20.
- 2 *Hoffman v. Gleason*, 107 F.2d 101 (C.C.A. 6th Cir. 1940).
- 3 *In re Petersen*, 437 B.R. 858 (D. Ariz. 2010); *In re Daewoo Motor America, Inc.*, 471 B.R. 721 (C.D. Cal. 2012), *aff'd*, 554 Fed. Appx. 638 (9th Cir. 2014).
As to a discussion of recoupment, generally, see § 5.
- 4 *Howard v. Abernathy*, 751 S.W.2d 432 (Tenn. Ct. App. 1988).
- 5 *U.S. v. Peterson*, 738 F. Supp. 2d 869 (C.D. Ill. 2010).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 22

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II. Actions and Claims in Which Remedy Lies

B. Effect of Status of Claim

1. Liquidation

§ 22. Unliquidated claim: Counterclaim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  16, 35(1), 35(2)

A claim for unliquidated damages may generally be interposed or pleaded as a counterclaim,¹ provided that it arises out of the contract on which the action is based² or is connected with the subject of the action.³

Caution:

The court may have the authority to strike a counterclaim that cannot be conveniently tried with the cause of action set forth in the complaint.⁴

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Footnotes

¹ [Hauger v. Gates](#), 42 Cal. 2d 752, 269 P.2d 609 (1954); [Henderson v. Northwest Airlines](#), 231 Minn. 503, 43 N.W.2d 786 (1950).

- 2 [Termini v. John Arthur Exhibitions, Inc.](#), 9 Misc. 2d 557, 169 N.Y.S.2d 584 (Sup 1957), (Note: Decisions combined in N.Y.S.2d) and judgment modified on other grounds, 9 Misc. 2d 833, 1957 WL 17311 (N.Y. Sup 1957), (Note: Decisions combined in N.Y.S.2d) and order aff'd, 5 A.D.2d 973, 173 N.Y.S.2d 243 (1st Dep't 1958).
- 3 [Crescent Hat Co. v. Chizik](#), 223 N.C. 371, 26 S.E.2d 871 (1943) (holding that an unliquidated claim for damages arising from an independent tort cannot be the subject of a counterclaim).
- 4 [Falkenstein v. Herman Kussy Co.](#), 137 N.J.L. 200, 59 A.2d 372 (N.J. Ct. Err. & App. 1948).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 23

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II. Actions and Claims in Which Remedy Lies

B. Effect of Status of Claim

2. Unmatured or Contingent Claims

§ 23. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  36, 37

Unmatured or contingent claims cannot be used as a setoff¹ or counterclaim.² Therefore, a defendant ordinarily cannot plead a contingent liability as a setoff, if the circumstances on which the liability is contingent have not occurred,³ nor may a defendant counterclaim for a contingent liability.⁴

Observation:

A claim or demand is generally mature only when presently enforceable,⁵ as when the party possessing the claim is entitled to a legal remedy.⁶ A counterclaim accrues and is fully matured when damage resulting from the claim is sustained and capable of ascertainment.⁷

Generally, claims for contribution or indemnification cannot be raised as counterclaims.⁸ Being contingent upon a verdict and judgment establishing liability, a claim for contribution is not a matured claim.⁹

Footnotes

- 1 [Lyhane v. Durtschi](#), 144 Neb. 256, 13 N.W.2d 130 (1944); [Petition of Leon Keyser, Inc.](#), 98 N.H. 198, 96 A.2d 551, 37 A.L.R.2d 845 (1953); [Merager v. Turnbull](#), 2 Wash. 2d 711, 99 P.2d 434, 127 A.L.R. 1142 (1940); [Mattek v. Hoffmann](#), 272 Wis. 503, 76 N.W.2d 300, 57 A.L.R.2d 696 (1956).
There must be at least two distinct debts or judgments that have matured at the time of a motion for setoff. [Mynatt v. Collis](#), 274 Kan. 850, 57 P.3d 513 (2002).
As to the setoff of unliquidated claims, generally, see § 20.
- 2 [Mattek v. Hoffmann](#), 272 Wis. 503, 76 N.W.2d 300, 57 A.L.R.2d 696 (1956).
As to the counterclaim of unliquidated claims, generally, see § 22.
- 3 [Federal Deposit Ins. Corp. v. Liberty Nat. Bank & Trust Co.](#), 806 F.2d 961 (10th Cir. 1986); [Ex parte Stember](#), 262 Ala. 56, 77 So. 2d 351 (1955).
- 4 [Stoller Fisheries, Inc. v. American Title Ins. Co.](#), 258 N.W.2d 336 (Iowa 1977); [Efdey Elec. Contractors, Inc. v. Melita](#), 167 A.D.2d 501, 562 N.Y.S.2d 172 (2d Dep't 1990); [Haberer v. First Bank of South Dakota \(NA\)](#), 429 N.W.2d 62 (S.D. 1988).
- 5 [Telegraph Herald, Inc. v. McDowell](#), 397 N.W.2d 518 (Iowa 1986).
- 6 [Schaefer v. Putnam](#), 841 N.W.2d 68 (Iowa 2013), as corrected on other grounds, (Dec. 18, 2013).
- 7 [Woodruff v. McMillan](#), 752 S.W.2d 493 (Mo. Ct. App. W.D. 1988).
- 8 [Bio-Vita, Ltd. v. Rausch](#), 759 F. Supp. 33 (D. Mass. 1991).
- 9 [Stahl v. Ohio River Co.](#), 424 F.2d 52, 13 Fed. R. Serv. 2d 111 (3d Cir. 1970) (construing [Fed. R. Civ. P. 13\(e\)](#)).
As to counterclaims maturing or acquired after pleading, see §§ 24, 25.

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B. Effect of Status of Claim

2. Unmatured or Contingent Claims

§ 24. Counterclaim maturing or acquired after pleading

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West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  40

Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff § 39](#) (Motion—For leave to amend answer—Counterclaim matured after answer served)

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff § 43](#) (Notice of motion—In federal court—For leave to file and serve counterclaim maturing or acquired after pleading)

Pursuant to the Federal Rules of Civil Procedure, the court may permit a party to file a supplemental pleading asserting a counterclaim that has matured or has been acquired by the party after serving an earlier pleading.¹ In other words, a claim that either matures or is acquired by the pleader after serving a pleading may, with the court's permission, be presented as a counterclaim by a supplemental pleading.²

Observation:

This rule avoids a multiplicity of litigation and the injustice of barring a late-maturing claim arising out of the same transaction or occurrence.³

This rule is permissive and not mandatory.⁴ Thus, permission to file an after-acquired counterclaim is within the court's discretion.⁵ The court should take into consideration the relationship of the proposed counterclaim and the plaintiff's original claim and should also consider whether a counterclaim will add to the complexities of the original action.⁶

Caution:

Although claims which have matured after the filing of a party's pleadings in the action may be pleaded with the permission of the court, such permission may be given only if the claim has matured when permission is requested. The rule permitting a counterclaim maturing or acquired after pleading does not provide for the acceleration of an unmatured claim.⁷

In some state jurisdictions, the defendant may set off any demand he or she has against the plaintiff at the commencement of the action, whether or not it has then matured, if it has matured before it is offered as a setoff.⁸ Elsewhere, a claim may be allowed as a setoff if it matures before trial.⁹

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Footnotes

- 1 [Fed. R. Civ. P. 13\(e\).](#)
- 2 [Read v. Baker](#), 438 F. Supp. 732, 25 Fed. R. Serv. 2d 271 (D. Del. 1977).
A competitor's proposed counterclaim against a manufacturer of lawn and garden equipment for an alleged violation of state unfair competition laws was governed by the provision of the counterclaim/cross-claim rule applicable to counterclaims that matured or were acquired after the pleader served a pleading, rather than by the provision applicable to counterclaims omitted from the original pleading through oversight, inadvertence, or excusable neglect, given that the proposed counterclaim was based on information and materials acquired during discovery, subsequent to the competitor's filing of its answer. [Deere & Company v. MTD Holdings Inc.](#), 2003 WL 22439778 (S.D. N.Y. 2003).
As to the amendment of counterclaims, see § 105.
- 3 [Spencer v. Newton](#), 79 F.R.D. 367 (D. Mass. 1978).
- 4 [Andrews v. Wade & De Young, Inc.](#), P.C., 950 P.2d 574 (Alaska 1997).
- 5 [Insurance Concepts, Inc. v. Western Life Ins. Co.](#), 639 F.2d 1108 (5th Cir. 1981); [General Motors Corp. v. Kolodin](#), 16 F.R.D. 20 (E.D. N.Y. 1954); [Aviation Materials, Inc. v. Pinney](#), 65 F.R.D. 357, 20 Fed. R. Serv. 2d 306 (N.D. Okla. 1975).
- 6 [Aviation Materials, Inc. v. Pinney](#), 65 F.R.D. 357, 20 Fed. R. Serv. 2d 306 (N.D. Okla. 1975) (stating that a counterclaim should not be permitted if it will serve to hinder and delay the plaintiff and make it more difficult for the plaintiff to prosecute its claim).

- 7 Stahl v. Ohio River Co., 424 F.2d 52, 13 Fed. R. Serv. 2d 111 (3d Cir. 1970).
8 B-W Acceptance Corp. v. Saluri, 258 Iowa 489, 139 N.W.2d 399 (1966).
9 Cameron v. Cameron, 235 N.C. 82, 68 S.E.2d 796, 31 A.L.R.2d 436 (1952).

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II. Actions and Claims in Which Remedy Lies

B. Effect of Status of Claim

2. Unmatured or Contingent Claims

§ 25. Counterclaim maturing or acquired after pleading—Compulsory counterclaims

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West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  40

Claims that have not matured by the time the defendant is required to file an answer in an earlier action are not subject to the compulsory counterclaim rule.¹ Thus, a party need not assert a compulsory counterclaim that has not matured at the time he or she serves his or her pleading, and a counterclaim acquired by the defendant after he or she has answered is not compulsory, even if it arises out of the same transaction as the plaintiff's claim.² Whether or not this exception to the compulsory counterclaim rule applies is determined by whether the claimant could have maintained the claim against the other party at the date of the claimant's pleading in the earlier action.³ Stated otherwise, the determination of a compulsory counterclaim is made when the potential counterclaimant must file an answer.⁴

Reminder:

The Federal Rules of Civil Procedure provide that a pleading must state as a counterclaim any claim that, at the time of its service, the pleader has against an opposing party if the claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, and does not require adding another party over whom the court cannot acquire jurisdiction.⁵

A cause of action matures, for purposes of the compulsory counterclaim rule, when a claimant has sustained an actual loss or resulting damage.⁶ While there is authority to the contrary,⁷ a claim is generally not mature for purposes of the counterclaim rule if, at the time of pleading, the claim is contingent upon the outcome of litigation.⁸

Caution:

Nevertheless, while there is support for the view that claims for contribution are outside the purview of the federal counterclaim rule because they are contingent upon the outcome of litigation and, thus, are not mature claims,⁹ a more modern view permits the filing of counterclaims for contribution in order to avoid a multiplicity of litigation in a complex case.¹⁰

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Footnotes

- 1 Arch Mineral Corp. v. Lujan, 911 F.2d 408, 17 Fed. R. Serv. 3d 543 (10th Cir. 1990); Imperial Cas. and Indem. Co. v. Town of Ayer, 139 F.R.D. 569, 23 Fed. R. Serv. 3d 98 (D. Mass. 1991); Sanders v. First Bank of Grove Hill, 564 So. 2d 869 (Ala. 1990); Empire Forest Products, Inc. v. Gillis, 184 Ga. App. 542, 362 S.E.2d 77 (1987); Stille v. Colborn, 740 S.W.2d 42 (Tex. App. San Antonio 1987), writ denied, (Mar. 30, 1988).
As to compulsory counterclaims, generally, see § 3.
- 2 Tapalian v. Town of Seekonk, 188 F. Supp. 2d 136 (D. Mass. 2002).
- 3 Blaser v. Cameron, 116 Idaho 453, 776 P.2d 462 (Ct. App. 1989); Pence v. Rawlings, 453 N.W.2d 249 (Iowa Ct. App. 1990).
- 4 Sanders v. First Bank of Grove Hill, 564 So. 2d 869 (Ala. 1990); Empire Forest Products, Inc. v. Gillis, 184 Ga. App. 542, 362 S.E.2d 77 (1987); Stille v. Colborn, 740 S.W.2d 42 (Tex. App. San Antonio 1987), writ denied, (Mar. 30, 1988).
The exception to the compulsory counterclaim rule for counterclaims that have not matured at the time a party serves its pleading did not apply to a generic drug manufacturer's federal antitrust claims alleging that a name-brand drug manufacturer had engaged in anti-competitive conduct by enforcing an invalid drug patent, inasmuch as the generic drug manufacturer could have asserted a valid antitrust claim when it filed its answer in a prior patent infringement action. Eon Laboratories, Inc. v. Smithkline Beecham Corp., 298 F. Supp. 2d 175 (D. Mass. 2003).
- 5 § 3.
- 6 Raymon v. Norwest Bank Marion, Nat. Ass'n, 414 N.W.2d 661 (Iowa Ct. App. 1987).
A claim is mature, for purposes of determining whether it is a compulsory counterclaim, when it has accrued. Ingersoll-Rand Co. v. Valero Energy Corp., 997 S.W.2d 203 (Tex. 1999), on reh'g in part, (Aug. 26, 1999).
- 7 Maryville Academy v. Loeb Rhoades & Co., Inc., 530 F. Supp. 1061 (N.D. Ill. 1981); Interphoto Corp. v. Minolta Corp., 47 F.R.D. 341 (S.D. N.Y. 1969).
- 8 Chicago Freight Car Leasing Co. v. Martin Marietta Corp., 66 F.R.D. 400, 19 Fed. R. Serv. 2d 1475 (N.D. Ill. 1975); Universal Underwriters Ins. Co. v. Security Industries, Inc., 391 F. Supp. 326 (W.D. Wash. 1974).
- 9 Stahl v. Ohio River Co., 424 F.2d 52, 13 Fed. R. Serv. 2d 111 (3d Cir. 1970); Slavics v. Wood, 36 F.R.D. 47 (E.D. Pa. 1964); Henz v. Superior Trucking Co., Inc., 96 F.R.D. 219, 36 Fed. R. Serv. 2d 242 (M.D. Pa. 1982); Marcus v. Marcoux, 41 F.R.D. 332 (D.R.I. 1967).

10

In re Oil Spill by Amoco Cadiz Off Coast of France on March 16, 1978, 491 F. Supp. 161 (N.D. Ill. 1979); Index Fund, Inc. v. Hagopian, 91 F.R.D. 599, 32 Fed. R. Serv. 2d 1103 (S.D. N.Y. 1981); Gilbert v. General Elec. Co., 59 F.R.D. 267 (E.D. Va. 1973).

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II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

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Research References


West's Key Number Digest

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A.L.R. Library

A.L.R. Index, Counterclaim, Recoupment, and Setoff

A.L.R. Index, Pleadings

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 26

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II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

1. Counterclaim

a. In General

§ 26. Generally

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West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  26, 29(1) to 29(3), 31, 34(1) to 34(3)

A.L.R. Library

[Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in same proceeding in which abuse occurred—state cases, 82 A.L.R.4th 1115](#)

In some jurisdictions, a counterclaim must arise from the contract or transaction that the complaint sets forth as the foundation of the plaintiff's claim,¹ or must be connected with the subject of the action,² regardless of the nature of the cause of action.³ Thus, a counterclaim that does not arise out of the contract or transaction set forth in the complaint, or that lacks the requisite connection with the subject of the action, may not be maintained.⁴ The relation of a counterclaim to the plaintiff's claim must be such that the adjustment of both is necessary to a full and final determination of the controversy.⁵

In other jurisdictions, however, the defendant's claim or cause of action need not arise out of the transaction or occurrence that is the subject of the plaintiff's complaint,⁶ and may concern any cause of action of the defendant,⁷ although it has been found that a counterclaim having nothing in common with the plaintiff's action will be disallowed.⁸ The sole test is whether the counterclaim can be conveniently and justly determined in connection with the plaintiff's cause of action.⁹

Caution:

If additional parties are brought in, the subject matter of the counterclaim must arise out of the same transaction or series of transactions as set out in the complaint, and the new defendants must have an interest in that controversy.¹⁰

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Footnotes

- 1 South Windsor Cemetery Ass'n, Inc. v. Lindquist, 114 Conn. App. 540, 970 A.2d 760 (2009); Bio-Scientific Clinical Laboratory, Inc. v. Todd, 149 Ill. App. 3d 845, 103 Ill. Dec. 171, 501 N.E.2d 192 (1st Dist. 1986); Schuelke v. Wilson, 255 Neb. 726, 587 N.W.2d 369 (1998); United Nat. Ins. Co. v. M. London, Inc., 337 Pa. Super. 526, 487 A.2d 385 (1985).
A condition precedent to the application of the statute providing for setoff is that the defendant's claim arise from a debt due by the plaintiff, but unlike a counterclaim, which arises out of the same transaction described in the complaint, setoff is independent thereof. *Hope's Architectural Products, Inc. v. Fox Steel Co.*, 44 Conn. App. 759, 692 A.2d 829 (1997).
- 2 Doss v. McClelland, 186 Kan. 173, 348 P.2d 837 (1960); Currie By and Through Currie v. Chief School Bus Service, Inc., 250 Neb. 872, 553 N.W.2d 469, 112 Ed. Law Rep. 1043 (1996); Standard Amusement Co. v. Tarkington, 247 N.C. 444, 101 S.E.2d 398 (1958); West Nichols Hills Water Co. v. American-First Trust Co. in Oklahoma City, 1945 OK 138, 195 Okla. 428, 158 P.2d 691 (1945).
- 3 Watson v. American Creosote Works, 1938 OK 578, 184 Okla. 13, 84 P.2d 431 (1938); Bolzer v. Hamilton, 78 S.D. 388, 103 N.W.2d 183 (1960).
- 4 McCastle v. Scanlon, 337 Mich. 122, 59 N.W.2d 114 (1953); Irby v. Citizens Nat. Bank of Meridian, 239 Miss. 64, 121 So. 2d 118 (1960); Thompson v. Pilot Life Ins. Co., 234 N.C. 434, 67 S.E.2d 444 (1951).
- 5 Allstate Ins. Co. v. Appell, 39 Conn. Supp. 85, 468 A.2d 949 (Super. Ct. 1983); Batts v. Gaylord, 253 N.C. 181, 116 S.E.2d 424 (1960).
- 6 Royal Indem. Co. v. Security Truck Lines, 212 Cal. App. 2d 61, 27 Cal. Rptr. 858 (1st Dist. 1963) (requiring only that the counterclaim diminish the plaintiff's recovery and involve only the parties to the action); Du Pont Plaza, Inc. v. Samuel Kipnis Family Foundation, 132 So. 2d 352 (Fla. 3d DCA 1961); Crawford v. Burkey, 93 A.D.3d 1134, 941 N.Y.S.2d 338 (3d Dep't 2012); Mahanna v. Westland Oil Co., 107 N.W.2d 353 (N.D. 1960).
- 7 Crawford v. Burkey, 93 A.D.3d 1134, 941 N.Y.S.2d 338 (3d Dep't 2012).
- 8 Murphy v. Appelli, 273 A.D. 261, 77 N.Y.S.2d 199 (1st Dep't 1948).
- 9 Panzer v. Panzer, 274 A.D. 940, 83 N.Y.S.2d 525 (2d Dep't 1948).
- 10 Johnson v. Moon, 3 Ill. 2d 561, 121 N.E.2d 774, 46 A.L.R.2d 1246 (1954).
As to claims by and against third parties, generally, see § 55.

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 27

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Counterclaim, Recoupment, and Setoff

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II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

1. Counterclaim

a. In General

§ 27. "Subject of action" defined

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  29(1) to 29(3)

In some jurisdictions requiring that a counterclaim be connected with the subject of the action,¹ the "subject of the action" refers to the plaintiff's primary or substantive right to enforce or maintain the action.² The term does not relate to the thing over which the controversy has arisen, but rather to the origin and grounds of the plaintiff's right to obtain the requested relief³ and to the facts constituting the plaintiff's cause of action.⁴

In other jurisdictions, the subject of an action is the thing or subject matter to which the litigation pertains,⁵ whether it is specific property, a contract, or a threatened or violated right.⁶

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Footnotes

- ¹ § 26.
- ² *Salina Coca-Cola Bottling Corp. v. Rogers*, 171 Kan. 688, 237 P.2d 218 (1951).
- ³ *Allen v. Chesapeake & O.R. Co.*, 304 Ky. 846, 202 S.W.2d 157 (1947).
- ⁴ *Union Nat. Bank of Okmulgee v. Jones*, 1931 OK 632, 152 Okla. 211, 4 P.2d 62 (1931).
- ⁵ *Hancammon v. Carr*, 229 N.C. 52, 47 S.E.2d 614 (1948).
- ⁶ *Wrenn v. Graham*, 236 N.C. 719, 74 S.E.2d 232 (1953).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 28

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II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

1. Counterclaim

a. In General

§ 28. "Same contract or transaction" defined

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  29(1) to 29(3)

In jurisdictions requiring that a counterclaim arise from the same contract or transaction that the complaint sets forth as the foundation of the plaintiff's claim,¹ the meaning of "transaction" is not legal and technical but common and colloquial.² The transaction test is one of practicality,³ and its purposes, which have been recognized by case law, should not be thwarted in its application.⁴ Thus, the term "transaction or occurrence" should be liberally construed,⁵ according to context and approved usage.⁶

Caution:

The term "same transaction" does not necessarily mean "occurring at the same time."⁷

In determining whether the parties' respective claims arise out of the same transaction, the court may consider the facts as stated by both the plaintiff and the defendant.⁸ A complete identity of issues is not required; rather, the claims must have a sufficient closeness that the trial of the complaint and counterclaim will not imperil judicial economy.⁹

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Footnotes

- 1 § 26.
- 2 Warren v. De Long, 59 Nev. 481, 97 P.2d 792 (1940); Sylvester v. Evans, 109 Ohio App. 211, 10 Ohio Op. 2d 436, 160 N.E.2d 142 (1st Dist. Hamilton County 1959); Benton County State Bank v. Nichols, 153 Or. 73, 54 P.2d 1166 (1936).
- 3 Ceci Bros., Inc. v. Five Twenty-One Corp., 81 Conn. App. 419, 840 A.2d 578 (2004).
- 4 Morgera v. Chiappardi, 74 Conn. App. 442, 813 A.2d 89 (2003).
- 5 Warshawsky & Co. v. Arcata Nat. Corp., 552 F.2d 1257, 23 Fed. R. Serv. 2d 727 (7th Cir. 1977); Shump v. Balka, 574 F.2d 1341, 25 Fed. R. Serv. 2d 857 (10th Cir. 1978); Hercules Inc. v. Dynamic Export Corp., 71 F.R.D. 101 (S.D. N.Y. 1976); Matter of Penn Cent. Transp. Co., 419 F. Supp. 1376 (E.D. Pa. 1976); Cole v. Lane, 67 F.R.D. 615, 20 Fed. R. Serv. 2d 1166 (D.S.C. 1975).
- 6 Warren v. De Long, 59 Nev. 481, 97 P.2d 792 (1940).
- 7 U.S. v. National City Bank of New York, 83 F.2d 236, 106 A.L.R. 1235 (C.C.A. 2d Cir. 1936); Sylvester v. Evans, 109 Ohio App. 211, 10 Ohio Op. 2d 436, 160 N.E.2d 142 (1st Dist. Hamilton County 1959).
- 8 Woodley v. Bubendorf, 11 Alaska 274, 69 F. Supp. 593 (Terr. Alaska 1947); Griffiths v. Thrasher, 95 Mont. 210, 26 P.2d 995 (1933); Benton County State Bank v. Nichols, 153 Or. 73, 54 P.2d 1166 (1936).
- 9 CitiMortgage, Inc. v. Rey, 150 Conn. App. 595, 92 A.3d 278 (2014).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 29

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II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

1. Counterclaim

a. In General

§ 29. "Connection with" subject of action defined

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  29(1) to 29(3)

In jurisdictions requiring that a counterclaim be "connected with" the subject of the action,¹ the connection must be immediate and direct,² rather than casual, incidental,³ remote, or partial.⁴ That the subject of the defendant's claim grew out of the plaintiff's action does not, alone, suffice as a connection authorizing a counterclaim.⁵ However, facts that the defendant sets up as a defense to the plaintiff's claim are connected with the subject of the action.⁶

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Footnotes

- ¹ § 26.
- ² *Allen v. Chesapeake & O.R. Co.*, 304 Ky. 846, 202 S.W.2d 157 (1947); *Currie By and Through Currie v. Chief School Bus Service, Inc.*, 250 Neb. 872, 553 N.W.2d 469, 112 Ed. Law Rep. 1043 (1996); *Thompson v. Pilot Life Ins. Co.*, 234 N.C. 434, 67 S.E.2d 444 (1951).
- ³ *Currie By and Through Currie v. Chief School Bus Service, Inc.*, 250 Neb. 872, 553 N.W.2d 469, 112 Ed. Law Rep. 1043 (1996); *Hancammon v. Carr*, 229 N.C. 52, 47 S.E.2d 614 (1948).
- ⁴ *McGerr v. Marsh*, 148 Neb. 50, 26 N.W.2d 374 (1947); *Hancammon v. Carr*, 229 N.C. 52, 47 S.E.2d 614 (1948).
- ⁵ *Manufacturers & Jobbers Finance Corporation v. Lane*, 221 N.C. 189, 19 S.E.2d 849 (1942).
- ⁶ *Cox v. Cashio*, 96 So. 2d 872 (La. Ct. App. 1st Cir. 1957); *Workman Motor Co. v. Pacific Finance Corporation*, 83 Utah 19, 26 P.2d 961 (1933).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 30

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II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

1. Counterclaim

a. In General

§ 30. Tendency to defeat or diminish plaintiff's demand; counterclaim exceeding opposing claim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  [23](#), [57](#), [59](#)

The Federal Rules of Civil Procedure provide that a counterclaim need not diminish or defeat the recovery sought by the opposing party. In addition, a counterclaim may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.¹ Thus, in federal courts a party may interpose a counterclaim in excess of the main claim.² Note, however, that it has been considered that a compulsory counterclaim in the nature of recoupment cannot claim relief exceeding or differing from that sought in the pleading of the opposing party.³

Observation:

If there is any doubt as to the facts, the court must view each claim as a separate cause of action and must grant the counterclaimant a trial, rather than grant summary judgment.⁴

In state courts, a counterclaim typically must impair, affect, or qualify the relief to which the plaintiff would otherwise be entitled.⁵ In addition, under various state laws it has been found that counterclaims cannot affect an affirmative recovery against the plaintiff, but rather may be maintained only to the extent of setting off the plaintiff's claim.⁶

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Footnotes

- 1 Fed. R. Civ. P. 13(c).
- 2 Massachusetts Cas. Ins. Co. v. Forman, 600 F.2d 481 (5th Cir. 1979) (construing Fed. R. Civ. P. 13(c)).
- 3 U.S. for Use and Benefit of Greenville Equipment Co. v. U.S. Cas. Co., 218 F. Supp. 653 (D. Del. 1962).
- 4 Gutor Intern. AG v. Raymond Packer Co., Inc., 493 F.2d 938, 18 Fed. R. Serv. 2d 689, 14 U.C.C. Rep. Serv. 567 (1st Cir. 1974) (construing Fed. R. Civ. P. 13(c)).
- 5 Rees v. Panhandle Eastern Pipe Line Co., 452 N.E.2d 405 (Ind. Ct. App. 1983); Hill v. Port Authority Transit System of Allegheny County, 137 Pa. Commw. 132, 585 A.2d 1129 (1991), order aff'd, 531 Pa. 457, 613 A.2d 1206 (1992); Doyer v. Pitney Bowes, Inc., 80 S.W.3d 215 (Tex. App. Austin 2002).
- 6 Providence Washington Ins. Co. v. Munoz, 85 A.D.3d 1142, 926 N.Y.S.2d 630 (2d Dep't 2011) (insurer's subrogation action).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 31

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II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

1. Counterclaim

b. Compulsory Counterclaim

§ 31. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#) 29(1) to 29(3)

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[Failure to assert matter as counterclaim as precluding assertion thereof in subsequent action, under federal rules or similar state rules or statutes, 22 A.L.R.2d 621](#)

[Effect of filing as separate federal action claim that would be compulsory counterclaim in pending federal action, 81 A.L.R. Fed. 240](#)

[Claim as to which right to demand arbitration exists as subject of compulsory counterclaim under Federal Rules of Civil Procedure 13\(a\), 2 A.L.R. Fed. 1051](#)

In the federal courts and in many state courts, a counterclaim that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim is compulsory.¹ A determination of whether a counterclaim is compulsory is not discretionary; rather, such a determination is made as a matter of law.²

In determining whether the original claim and the counterclaim arise out of the same transaction or occurrence for such purposes, the courts commonly consider four issues:³

- (1) whether the issues of fact and law raised by the claim and counterclaim are largely the same;
- (2) whether res judicata would bar a subsequent suit on the defendant's claim absent the compulsory counterclaim rule;
- (3) will substantially the same evidence support or refute the plaintiff's claim as well as the defendant's counterclaim; and
- (4) whether there is any logical relation between the claim and counterclaim.

While under some authority an affirmative answer to any of the above questions makes the counterclaim compulsory,⁴ it has also been considered that no single test is conclusive.⁵ A court may also consider the risk of inconsistent adjudications, the practice of racing to obtain judgments, and the efficiency of deciding common issues in one tribunal rather than two.⁶

Practice Tip:

The "transaction or occurrence" analysis under the Federal Rule may be defined by state law, when the state's definition of the relationship between two claims is clearly the product of substantive state concerns. In such circumstances, the Federal Rule incorporates that definition.⁷

CUMULATIVE SUPPLEMENT

Cases:

Consumers' claims for violations of the Fair Debt Collection Practices Act (FDCPA) against debt buyer and its attorneys were not compulsory counterclaims to debt collection action under federal procedural rule making a counterclaim compulsory if it arose out of the transaction or occurrence that was the subject matter of the opposing party's claim, because the FDCPA focused on misconduct in the debt collection process rather than the collectability of the debt itself. [Fed. R. Civ. P. 13\(a\)](#). [Ramos v. LVNV Funding, LLC](#), 379 F. Supp. 3d 437 (E.D. Pa. 2019).

Former wife's petition to hold former husband in contempt for failing to pay his periodic-alimony obligation was a compulsory counterclaim to former husband's petition seeking termination or modification of his periodic-alimony obligation, where the claims arose from the same core of operative facts surrounding the propriety of the continuation of former husband's periodic-alimony obligation and his decision to unilaterally stop paying that obligation based on former wife's alleged cohabitation with another man. [Ex parte Dozier](#), 170 So. 3d 673 (Ala. Civ. App. 2014).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Shavers v. Massey-Ferguson, Inc.](#), 834 F.2d 970, 9 Fed. R. Serv. 3d 984, 5 U.C.C. Rep. Serv. 2d 106 (11th Cir. 1987); [Alesayi Beverage Corp. v. Canada Dry Corp.](#), 797 F. Supp. 320 (S.D. N.Y. 1992); [Grynberg v.](#)

Rocky Mountain Natural Gas, a Div. of KN Energy, Inc., 809 P.2d 1091 (Colo. App. 1991); Harper v. Harper, 267 Ga. App. 553, 600 S.E.2d 659 (2004); Village of College Corner v. Town of West College Corner, 766 N.E.2d 742 (Ind. Ct. App. 2002); Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002). A counterclaim is compulsory if it arises out of the transaction that is the subject matter of the opposing party's claim and does not require the presence of third parties over whom the court cannot acquire jurisdiction. G.A.W., III v. D.M.W., 596 N.W.2d 284 (Minn. Ct. App. 1999).

As to compulsory counterclaims, generally, see § 3.

2 Republic Health Corp. v. Lifemark Hospitals of Florida, Inc., 755 F.2d 1453, 1 Fed. R. Serv. 3d 793 (11th Cir. 1985).

3 U.S. v. Aronson, 617 F.2d 119, 29 Fed. R. Serv. 2d 749 (5th Cir. 1980); Berrey v. Asarco Inc., 439 F.3d 636 (10th Cir. 2006); Matter of Canter, 1 B.R. 172 (Bankr. D. Mass. 1979).

As to the "logical relationship" test for compulsory counterclaims, see § 32.

4 Plant v. Blazer Financial Services, Inc. of Georgia, 598 F.2d 1357, 27 Fed. R. Serv. 2d 955, 51 A.L.R. Fed. 493 (5th Cir. 1979).

5 Federman v. Empire Fire and Marine Ins. Co., 597 F.2d 798, 27 Fed. R. Serv. 2d 48 (2d Cir. 1979).

6 Columbia Plaza Corp. v. Security Nat. Bank, 525 F.2d 620, 20 Fed. R. Serv. 2d 1301 (D.C. Cir. 1975).

7 Answering Service, Inc. v. Egan, 728 F.2d 1500 (D.C. Cir. 1984) (construing Fed. R. Civ. P. 13(a)).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 32

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II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

1. Counterclaim

b. Compulsory Counterclaim

§ 32. "Logical relationship" test of compulsoriness

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#) 29(1) to 29(3)

One broad test to be applied in determining whether a counterclaim is compulsory is whether a logical relationship exists between the respective claims asserted by the opposing parties.¹ The "logical relationship" test is a loose standard that should be interpreted broadly and realistically in the interest of avoiding a multiplicity of suits.² The analysis concerns whether the essential facts of the various claims are so logically connected that judicial economy and fairness require that all the issues be resolved in one lawsuit.³

A counterclaim is logically related to the opposing party's claim if separate trials on each of the claims would involve a substantial duplication of effort and time by the parties and the courts.⁴ There is a logical relationship when the same operative facts are the basis of both claims,⁵ or when the aggregate core of facts upon which the first claim rests activates additional legal rights, otherwise dormant, in the defendant.⁶ An absolute identity of factual backgrounds for the two claims is not required.⁷ On the other hand, the mere fact that some tangential relationship may be articulated between the two claims is not sufficient to find them "logically related."⁸

Observation:

While there is authority to the contrary,⁹ this test has been described as the one compelling test of whether a counterclaim is compulsory.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

When determining whether a counterclaim is compulsory, rather than look to whether the original claim and counterclaim literally arise out of the same transaction or occurrence, the court asks whether there is a logical relationship between the two claims; under this test, the court determines whether the issues of law and fact raised by the claims are largely the same and whether substantially the same evidence would support or refute both claims. [Fed.Rules Civ.Proc.Rule 13\(a\)](#), 28 U.S.C.A. [Bauman v. Bank of America, N.A.](#), 808 F.3d 1097 (6th Cir. 2015).

A claim is a compulsory counterclaim to a previous lawsuit if it is logically related to a prior action, in that the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights, otherwise dormant, in the defendant. [Fed.Rules Civ.Proc.Rule 13](#), 28 U.S.C.A. [Roban v. Marinosci Law Group](#), 34 F. Supp. 3d 1252 (S.D. Fla. 2014).

Borrower's counterclaim against non-party loan servicer, seeking damages on behalf of borrowers on any mortgage for breach of Florida Consumer Collection Practices Act, was permissive, and thus trial court's order allowing compulsory counterclaims only to proceed effectively denied borrower's motion to amend to assert counterclaim against servicer, rendering order nonfinal, and unappealable, with respect to counterclaim; elements of counterclaim were beyond operative facts of foreclosure complaint. [Fla. Stat. Ann. § 559.55\(6\)](#). [Cabrera v. U.S. Bank National Association](#), 281 So. 3d 516 (Fla. 4th DCA 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Ex parte J.C. Duke & Associates, Inc.](#), 4 So. 3d 1092 (Ala. 2008); [Mirchandani v. BMO Harris Bank, N.A.](#), 235 Ariz. 68, 326 P.3d 335 (Ct. App. Div. 1 2014); [Align Technology, Inc. v. Bao Tran](#), 179 Cal. App. 4th 949, 102 Cal. Rptr. 3d 343 (6th Dist. 2009); [Cunningham v. MBNA America Bank, N.A.](#), 8 So. 3d 438 (Fla. 2d DCA 2009); [Adams v. Key](#), 145 N.M. 52, 2008-NMCA-135, 193 P.3d 599 (Ct. App. 2008); [Moore v. First Financial Resolution Enterprises, Inc.](#), 277 S.W.3d 510 (Tex. App. Dallas 2009).
As to the issues considered by courts in determining whether the original claim and the counterclaim arise out of the same transaction or occurrence, see § 31.
- 2 [Federman v. Empire Fire and Marine Ins. Co.](#), 597 F.2d 798, 27 Fed. R. Serv. 2d 48 (2d Cir. 1979); [Plains Metropolitan Dist. v. Ken-Caryl Ranch Metropolitan Dist.](#), 250 P.3d 697 (Colo. App. 2010).
- 3 [Harris v. Steinem](#), 571 F.2d 119, 24 Fed. R. Serv. 2d 1230 (2d Cir. 1978).
- 4 [Xerox Corp. v. SCM Corp.](#), 576 F.2d 1057, 25 Fed. R. Serv. 2d 597 (3d Cir. 1978); [In re U.S. Eagle Corp.](#), 484 B.R. 640 (Bankr. D. N.J. 2012); [Forney v. Climbing Higher Enterprises, Inc.](#), 158 Ohio App. 3d 338, 2004-Ohio-4444, 815 N.E.2d 722 (9th Dist. Summit County 2004).

- 5 [Republic Health Corp. v. Lifemark Hospitals of Florida, Inc.](#), 755 F.2d 1453, 1 Fed. R. Serv. 3d 793 (11th Cir. 1985); [Cunningham v. MBNA America Bank, N.A.](#), 8 So. 3d 438 (Fla. 2d DCA 2009); [Meadow Springs, LLC v. IH Riverdale, LLC](#), 323 Ga. App. 478, 747 S.E.2d 47 (2013), cert. denied, (Jan. 6, 2014); [Hotmix & Bituminous Equipment Inc. v. Hardrock Equipment Corp.](#), 719 N.E.2d 824 (Ind. Ct. App. 1999).
- Under the logical relationship standard, a counterclaim is compulsory if: (1) its trial in the original action would avoid a substantial duplication of effort; or (2) the original claim and the counterclaim arose out of the same aggregate core of operative facts. [Stewart v. Brinley](#), 902 So. 2d 1 (Ala. 2004).
- 6 [Republic Health Corp. v. Lifemark Hospitals of Florida, Inc.](#), 755 F.2d 1453, 1 Fed. R. Serv. 3d 793 (11th Cir. 1985); [Santiago-Sepulveda v. Esso Standard Oil Co. \(Puerto Rico\), Inc.](#), 256 F.R.D. 39 (D.P.R. 2009); [Leon F. Cohn, M.D., P.A. v. Visual Health and Surgical Center, Inc.](#), 125 So. 3d 860 (Fla. 4th DCA 2013); [Steve A. Martin Agency, Inc. v. PlantersFIRST Corp.](#), 297 Ga. App. 780, 678 S.E.2d 186 (2009); [Letourneau v. Hickey](#), 174 Vt. 481, 807 A.2d 437 (2002).
- 7 [U.S. v. Aquavella](#), 615 F.2d 12 (2d Cir. 1979).
- To arise from the same transaction under the logical relationship test to determine whether a claim is a compulsory counterclaim, at least some of the facts must be relevant to both claims. [Community State Bank v. NSW Investments, L.L.C.](#), 38 S.W.3d 256 (Tex. App. Texarkana 2001).
- 8 [Bigley v. Mosser](#), 235 Ga. App. 583, 509 S.E.2d 406 (1998).
- 9 § 31.
- 10 [Rosenthal v. Fowler](#), 12 F.R.D. 388 (S.D. N.Y. 1952).

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C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

1. Counterclaim

b. Compulsory Counterclaim

§ 33. Contract and tort cases

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West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#) 29(1) to 29(3), 34(1) to 34(3)

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[Claim for wrongful death as subject of counterclaim or cross action in negligence action against decedent's estate, and vice versa, 6 A.L.R.2d 256](#)

Counterclaims arising out of the same contract as the plaintiff's claim are ordinarily compulsory.¹ Thus, for instance, a counterclaim may be viewed as compulsory if the plaintiff, in order to succeed on the principal claim, must prove that certain services were allegedly performed in accordance with the terms of a contractual agreement, while the defendant, in defense to the principal claim and also to support its counterclaim, alleges that the plaintiff did not perform such services in accordance with the terms of the contract.²

Caution:

The mere fact that the parties have entered into several agreements does not mean that these agreements constitute one ongoing transaction.³

A counterclaim arising from the same occurrence, such as a motor vehicle accident, as the opposing party's claim is ordinarily a compulsory counterclaim.⁴ A counterclaim alleging interference with the defendant's business as part of the plaintiff's scheme to monopolize is a compulsory counterclaim, if the main claim alleges copyright infringement, false designation of origin, and unfair competition.⁵

Observation:

Defendants who are not obligors on the original note and mortgage in an in rem foreclosure action are not required to bring, as compulsory counterclaims, all tort claims arising out of the foreclosure action, where, at the time they have filed their answers or defaulted, the defendants have no information on which to assert compulsory counterclaims.⁶

CUMULATIVE SUPPLEMENT

Cases:

Assuming that developer's fraud, negligent misrepresentation, and tortious interference claims against Federal Deposit Insurance Corporation (FDIC) could be characterized as counterclaims even though they arose from a third-party complaint in intervention, the claims were not compulsory claims in recoupment, and thus the District Court lacked subject matter jurisdiction over the claims in FDIC's action, as receiver for a failed bank, against personal guarantors of a loan to develop a condominium complex, where developer's claims arose out of developer's subsequent alleged communications with the FDIC and loan servicer, which had little to do with the enforceability of the underlying loan guaranties, and there was nothing to suggest that res judicata would bar developer from subsequently bringing the claims against the FDIC. [Federal Deposit Insurance Corporation v. Aviano](#), 184 F. Supp. 3d 1276 (D. Utah 2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Warshawsky & Co. v. Arcata Nat. Corp.](#), 552 F.2d 1257, 23 Fed. R. Serv. 2d 727 (7th Cir. 1977); [Beech Aircraft Corp. v. EDO Corp.](#), 990 F.2d 1237, 25 Fed. R. Serv. 3d 1249 (Fed. Cir. 1993); [Battista v. Tiger](#)

Flower & Co., 36 Fed. R. Serv. 2d 721 (D.D.C. 1983); [Thomson-CSF Components Corp. v. Hathaway Instruments, Inc.](#), 85 F.R.D. 344, 29 Fed. R. Serv. 2d 42 (D.N.J. 1980); [Hercules Inc. v. Dynamic Export Corp.](#), 71 F.R.D. 101 (S.D. N.Y. 1976).

2 [Old Hickory Barge & Fleeting, Inc. v. Barge M-553](#), 107 F.R.D. 689 (M.D. La. 1985).

3 [Curtis v. J. E. Caldwell & Co.](#), 86 F.R.D. 454 (E.D. Pa. 1980).

4 [Stancill v. McKenzie Tank Lines, Inc.](#), 497 F.2d 529 (5th Cir. 1974); [Weber v. Weber](#), 44 F.R.D. 227 (E.D. Pa. 1968).

5 [Four Seasons Solar Products Corp. v. Sun System Prefabricated Solar Greenhouses, Inc.](#), 101 F.R.D. 292, 37 Fed. R. Serv. 2d 1243 (E.D. N.Y. 1983).

6 [Aguilar v. Southeast Bank, N.A.](#), 728 So. 2d 744 (Fla. 1999).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 34

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Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

1. Counterclaim

c. Permissive Counterclaim

§ 34. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  29(1) to 29(3), 34(1) to 34(3)

Under the Federal Rules of Civil Procedure, a pleading may state as a counterclaim against an opposing party any claim that is not compulsory. Thus, unlike a compulsory counterclaim, a permissive counterclaim need not arise out of the transaction or occurrence that is the subject of the plaintiff's claim.¹ In federal courts, therefore, a permissive counterclaim is generally allowed, even though it involves a different transaction from the original action.² In many state courts as well, a permissible counterclaim need not relate to the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, nor be connected with the subject of the action.³ If multiple claims involve many of the same factual issues or the same factual and legal issues, or if they are offshoots of the same basic controversy between the parties, fairness, convenience, and economy may require that the counterclaimant be permitted to maintain his or her cause of action.⁴

Practice Tip:

The only new facts that may be introduced into pending litigation by a counterclaim are those the court needs in order to decide the questions raised in the original action and to reach a just result concerning the cause of action on which the complaint rests.⁵

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Footnotes

- 1 § 4.
- 2 U.S. v. Rudis, 178 F. Supp. 864 (N.D. Ill. 1959) (construing Fed. R. Civ. P. 13(b)).
- 3 Du Pont Plaza, Inc. v. Samuel Kipnis Family Foundation, 132 So. 2d 352 (Fla. 3d DCA 1961); General Tire & Rubber Co. v. Distributors, Inc., 251 N.C. 406, 111 S.E.2d 614 (1959).
Permissive counterclaims, by their nature, do not have to arise out of the transaction that is the basis of the main claim. Bisson v. Eck, 430 Mass. 406, 720 N.E.2d 784, 40 U.C.C. Rep. Serv. 2d 333 (1999).
- 4 Park Club, Inc. v. Resolution Trust Corp., 967 F.2d 1053, 23 Fed. R. Serv. 3d 490 (5th Cir. 1992); Matter of Penn Cent. Transp. Co., 419 F. Supp. 1376 (E.D. Pa. 1976); Cole v. Lane, 67 F.R.D. 615, 20 Fed. R. Serv. 2d 1166 (D.S.C. 1975).
- 5 Trout v. Brown, 125 Ind. App. 381, 123 N.E.2d 647 (1955).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 35

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Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

2. Setoff

§ 35. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  28(1), 28(2), 33(1), 33(2)

A claim for setoff ordinarily need not arise out of the same transaction as that sued on,¹ nor need it be germane to the cause of action alleged in the complaint.² If the parties are mutually indebted, the defendant may generally set off any claim or demand it may have against the plaintiff,³ whether or not the debt is distinct from the plaintiff's cause of action⁴ or arises out of the same contract or transaction as that on which the plaintiff's claim is based.⁵

Caution:

There is, however, contrary authority,⁶ providing that the parties' demands must be of the same grade and nature in order for the right of setoff to be established.⁷

CUMULATIVE SUPPLEMENT

Cases:

Purchaser of wholesale nursery company failed to prove its entitlement to a setoff as to a claim of open account asserted by a nursery retained by sellers of the company, in sellers' action against purchaser seeking declaration that a non-compete provision in purchase agreement was unenforceable, in which action purchaser counterclaimed for damages and injunction preventing violation of the provision; exhibit indicating the amount of set-off was not dated, purchaser's executive who testified to the document's authenticity did not provide a date for the document, and other records did not reflect an amount owed to purchaser by nursery. [Berry and Berry Acquisitions, LLC v. BFN Properties LLC](#), 2018 OK 27, 416 P.3d 1061 (Okla. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Westinghouse Credit Corp. v. D'Urso](#), 278 F.3d 138 (2d Cir. 2002) (applying New York law); [Newbery Corp. v. Fireman's Fund Ins. Co.](#), 95 F.3d 1392 (9th Cir. 1996); [In re Fischbach](#), 464 B.R. 258 (Bankr. D. S.C. 2012); [Hope's Architectural Products, Inc. v. Fox Steel Co.](#), 44 Conn. App. 759, 692 A.2d 829 (1997); [Aviation Ventures, Inc. v. Joan Morris, Inc.](#), 121 Nev. 113, 110 P.3d 59 (2005); [Sommers v. Concepcion](#), 20 S.W.3d 27 (Tex. App. Houston 14th Dist. 2000).
As to a discussion of setoffs, generally, see §§ 6, 7.
- 2 [Deveny v. Treesh](#), 117 Ind. App. 374, 72 N.E.2d 578 (1947).
- 3 [M & D Masonry, Inc. v. Universal Sur. Co.](#), 6 Neb. App. 215, 572 N.W.2d 408 (1997).
A right of "recoupment" arises from the same transaction or contract that creates an asset, whereas "setoff" is a broader term referring to any claim or demand, however created, that the holder of the asset has against the debtor. [National City Bank, Northwest v. Columbian Mut. Life Ins. Co.](#), 282 F.3d 407, 47 U.C.C. Rep. Serv. 2d 361, 2002 FED App. 0074P (6th Cir. 2002).
As to recoupment in this regard, see § 37.
As to the mutuality of parties and demands, see §§ 52 to 60.
- 4 [Drennan v. Chalfant](#), 177 Kan. 633, 282 P.2d 442 (1955); [Austin v. Summers](#), 237 S.C. 613, 118 S.E.2d 684 (1961).
- 5 [Guschl v. Schmidt](#), 266 Wis. 410, 63 N.W.2d 759 (1954).
- 6 [Louisville & N.R. Co. v. Dry Branch Coal Co.](#), 252 Ky. 124, 65 S.W.2d 1008 (1933); [Johns-Manville Sales Corp. v. Connelly](#), 144 W. Va. 498, 108 S.E.2d 836 (1959).
"Setoff" is a cause of action brought by a defendant in opposition to the plaintiff's claim and seeks affirmative relief against the plaintiff; it must be based upon the same transaction underlying the plaintiff's cause of action. [Kaiser by Taylor v. Monitrend Inv. Management, Inc.](#), 672 A.2d 359 (Pa. Commw. Ct. 1996).
- 7 [Auton's Fine Jewelry & Bridal Center, Inc. v. Beckner's, Inc.](#), 707 S.W.2d 539, 1 U.C.C. Rep. Serv. 2d 1067 (Tenn. Ct. App. 1986).

20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 36

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Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

2. Setoff

§ 36. Nature of claim as independent and extrinsic

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  [28\(1\)](#), [28\(2\)](#), [33\(1\)](#), [33\(2\)](#)

A claim for setoff ordinarily need not arise out of the same transaction as that sued on;¹ indeed, it has been stated that setoff grows out of matter independent of the plaintiff's cause of action.² It is also considered that a setoff arises out of a transaction extrinsic to the plaintiff's claim.³

Observation:

A setoff is generally founded on a liquidated debt and used to discharge or reduce the plaintiff's claim by an opposite claim arising from a transaction extrinsic to the plaintiff's cause of action; thus, a "setoff" is an independent claim and not an affirmative defense.⁴

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Footnotes

¹ [§ 35.](#)

- 2 Goldwell of New Jersey, Inc. v. KPSS, Inc., 622 F. Supp. 2d 168 (D.N.J. 2009); Mariculture Products Ltd. v. Those Certain Underwriters at Lloyd's of London Individually Subscribing to Certificate No. 1395/91, 84 Conn. App. 688, 854 A.2d 1100 (2004); American Management, Inc. v. MIF Realty, L.P., 666 N.E.2d 424 (Ind. Ct. App. 1996); Miah v. Ahmed, 179 N.J. 511, 846 A.2d 1244 (2004); State ex rel. Key West Retaining Systems, Inc. v. Holm II, Inc., 185 Or. App. 182, 59 P.3d 1280 (2002).
- 3 Pennington v. Wells Fargo Bank, N.A., 947 F. Supp. 2d 529 (E.D. Pa. 2013); Finish Line v. J.F. Pate & Associates Contractors, Inc., 90 So. 3d 749 (Ala. Civ. App. 2012); Nadhir v. Salomon, 2011 IL App (1st) 110851, 354 Ill. Dec. 428, 957 N.E.2d 1221 (App. Ct. 1st Dist. 2011); Miller v. Parker McCurley Properties, L.L.C., 36 So. 3d 1234 (Miss. 2010); Unerstall Foundations, Inc. v. Corley, 328 S.W.3d 305 (Mo. Ct. App. E.D. 2010).
- 4 Gibson v. City of St. Louis, 349 S.W.3d 460 (Mo. Ct. App. E.D. 2011).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 37

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II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

3. Recoupment

§ 37. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  [27\(1\)](#), [27\(2\)](#), [32](#)

The defense of recoupment usually requires that the damages to be recouped grow out of the same contract or transaction that is the foundation of the plaintiff's cause of action,¹ or that the damages to be recouped are connected with the subject of the action.² Stated otherwise, in recoupment, the claim and counterclaim must arise out of the same transaction or set of transactions.³

If the damages claimed by the defendant arise from the breach of an independent contract or from a wrong unconnected with the plaintiff's cause of action, recoupment is not permitted.⁴ Any claim of recoupment must arise out of the identical transaction that provided the plaintiff with a cause of action,⁵ and no affirmative relief may be granted independent of plaintiff's claim.⁶

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¹ [In re Terry](#), 687 F.3d 961 (8th Cir. 2012); [In re Petersen](#), 437 B.R. 858 (D. Ariz. 2010); [Kellogg v. Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A.](#), 807 So. 2d 669 (Fla. 4th DCA 2001); [McCoig Materials, LLC v. Galui Const., Inc.](#), 295 Mich. App. 684, 818 N.W.2d 410 (2012); [Midlantic Nat. Bank v. Georgian, Ltd.](#), 233 N.J. Super. 621, 559 A.2d 872 (Law Div. 1989); [Minex Resources, Inc. v. Morland](#), 467 N.W.2d 691 (N.D. 1991).

For recoupment to apply, both the primary damage claim and the claim in recoupment must arise out of the same transaction and involve the same litigants. [F.D.I.C. v. Kooyomjian](#), 220 F.3d 10 (1st Cir. 2000).

The recoupment defense was properly stricken where it did not arise out of any of the transactions or occurrences upon which the complaint was based. [Al-Abood ex rel. Al-Abood v. El-Shamari](#), 217 F.3d 225, 176 A.L.R. Fed. 761 (4th Cir. 2000) (applying Virginia law).

As to a discussion of recoupment, generally, see § 5.

2 [Finish Line v. J.F. Pate & Associates Contractors, Inc.](#), 90 So. 3d 749 (Ala. Civ. App. 2012); [Burton v. Campbell Coal Co.](#), 95 Ga. App. 338, 97 S.E.2d 924 (1957); [Calhoun v. McNair](#), 175 Miss. 44, 166 So. 330 (1936).

A defense asserted by way of recoupment must be related to the nature of the demand brought by the plaintiff. [Algrant v. Evergreen Valley Nurseries Ltd. Partnership](#), 126 F.3d 178 (3d Cir. 1997) (applying Pennsylvania law).

3 [In re Malinowski](#), 156 F.3d 131 (2d Cir. 1998).

Taxpayers could not rely on the doctrine of equitable recoupment to offset their tax liability for two years against their overpayments of taxes for two other years, since four separate transactions were involved. [U.S. v. Szopa](#), 38 F. Supp. 2d 1014 (N.D. Ill. 1999), judgment aff'd, 210 F.3d 377 (7th Cir. 2000).

4 [McGovern v. Martz](#), 182 F. Supp. 343, 3 Fed. R. Serv. 2d 171 (D. D.C. 1960); [Molesworth v. Schmidt](#), 196 Md. 15, 75 A.2d 100 (1950); [Rochester Health Network, Inc. v. Rochester Hosp. Service Corp.](#), 123 A.D.2d 509, 507 N.Y.S.2d 100 (4th Dep't 1986).

5 [M & D Masonry, Inc. v. Universal Sur. Co.](#), 6 Neb. App. 215, 572 N.W.2d 408 (1997); [Associates Home Equity Services, Inc. v. Troup](#), 343 N.J. Super. 254, 778 A.2d 529 (App. Div. 2001).

It was not error, in a suit for breach of contract, to allow the defendants to add a counterclaim in the nature of recoupment, where the counterclaim related to the plaintiff's performance under the very same contract pursuant to which the plaintiff sought to recover. [Enrico & Sons Contracting, Inc. v. Bridgemarket Associates](#), 252 A.D.2d 429, 675 N.Y.S.2d 351 (1st Dep't 1998).

6 [Associates Home Equity Services, Inc. v. Troup](#), 343 N.J. Super. 254, 778 A.2d 529 (App. Div. 2001).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 38

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II. Actions and Claims in Which Remedy Lies

C. Relationship of Counterclaim, Setoff, or Recoupment to Plaintiff's Action

3. Recoupment

§ 38. Determination of same transaction

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  27(1), 27(2), 32

The crucial factor in ascertaining whether two events are part of the "same transaction," for recoupment purposes, is whether there is a logical relationship between the two; the transaction may include a series of many occurrences, depending not so much on the immediateness of their connection as upon their logical relationship.¹ The entire transaction, requiring the things agreed to be done on each side as the condition passing between the parties, must be considered in deciding the defense of recoupment, including duties expressly or by implication imposed by the contract.² For debts to arise out of the "same transaction," for recoupment purposes, they must arise out of a single integrated transaction, such that it would be inequitable for the debtor to enjoy the benefits of the transaction without also meeting its obligations.³

A claim for recoupment must be premised on the same contract or transaction, and the categorization of the parties' agreement as a single contract or an open account is not determinative. Rather, the claim for recoupment by the defendant must be premised on the same transaction raised in the plaintiff's complaint, and the defendant must prove that the plaintiff is in breach of the contract from which the defendant seeks recoupment.⁴

Caution:

Although the "same transaction" requirement for recoupment may be met when the two claims arise from a single contract, the existence of a single contract does not automatically satisfy the "same transaction" requirement.⁵ Thus, for instance, where the

contract itself contemplates the business to be transacted as discrete and independent units, even claims predicated on a single contract will be ineligible for recoupment.⁶

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Footnotes

- 1 [In re Petersen](#), 437 B.R. 858 (D. Ariz. 2010).
- 2 [In re American Remanufacturers, Inc.](#), 451 B.R. 349 (Bankr. D. Del. 2011) (applying Tennessee law).
- 3 [In re Lunt](#), 477 B.R. 812 (Bankr. D. Kan. 2012), [aff'd](#), 500 B.R. 9 (D. Kan. 2013).
- 4 [McCoig Materials, LLC v. Galui Const., Inc.](#), 295 Mich. App. 684, 818 N.W.2d 410 (2012).
- 5 [In re Prochnow](#), 467 B.R. 656 (C.D. Ill. 2012).
- 6 [Westinghouse Credit Corp. v. D'Urso](#), 278 F.3d 138 (2d Cir. 2002).

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II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

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Research References

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  13 to 15

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A.L.R. Index, Counterclaim, Recoupment, and Setoff

A.L.R. Index, Pleadings

West's A.L.R. Digest, [Set-off and Counterclaim](#)  13 to 15

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II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

1. In General

§ 39. Exempt claims or exempt property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  13

Generally, if the subject of an action is property exempt from execution, the defendant may not defeat the exemption by setting up a counterclaim or setoff, even absent an express statutory provision protecting exempt property from the right of counterclaim or setoff.¹

Caution:

In some jurisdictions, however, the right of setoff is not subordinate to the right of exemption from execution.² In addition, an exemption from sale on execution or other final process may not be available before judgment so as to destroy the right of counterclaim or setoff.³

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Footnotes

- 1 Atlantic Life Ins. Co. v. Ring, 167 Va. 121, 187 S.E. 449, 106 A.L.R. 1064 (1936).
- 2 Fischer v. Pope, 233 Ala. 301, 171 So. 752 (1937).
- 3 Edgerton v. Johnson, 218 N.C. 300, 10 S.E.2d 918 (1940).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 40

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II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

1. In General

§ 40. Counterclaim or setoff for penalty

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  13

A.L.R. Library

[Availability of setoff, counterclaim, or the like to recover either penalty for usury in, or usurious interest paid on, separate transaction or instrument, 54 A.L.R.2d 1344](#)

Generally, a statutory penalty cannot be used as a setoff or counterclaim; rather, the aggrieved party or his or her legal representative must resort to the penal suit provided by statute. If the statute provides for recovery by direct action only, the statutory penalties may not be recovered by a counterclaim or some other defensive pleading.¹

Observation:

It has been found, however, that a consumer who is awarded penalties may set off the penalties against the consumer's obligation to the creditor.²



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Footnotes

- 1 [Globe Indem. Co. v. Cooper Motor Lines, 206 S.C. 154, 33 S.E.2d 405 \(1945\).](#)
- 2 [Public Finance Co. v. Van Blaricome, 324 N.W.2d 716 \(Iowa 1982\).](#)

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 41

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II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

1. In General

§ 41. Counterclaim for declaratory judgment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  13

Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff § 4](#) (Answer—With setoff or counterclaim—Requesting declaratory relief)

A counterclaim for a declaratory judgment is permissible if the prerequisites for a declaratory judgment have been met.¹ When a declaratory judgment counterclaim has greater ramifications than the original suit, such as settling future disputes, a court may allow the counterclaim.²

In federal courts, the "transaction or occurrence" test for determining whether a counterclaim is compulsory applies to counterclaims for a declaratory judgment, which, like other counterclaims, can be either compulsory or permissive.³

Caution:

A counterclaim for declaratory relief may become redundant and moot upon the disposition of the complaint, if there is clearly a complete identity of factual and legal issues between the complaint and the counterclaim.⁴

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Footnotes

- 1 [International Woodworkers of America, Local 6-64, C I O v. McCloud River Lumber Co](#), 119 F. Supp. 475 (N.D. Cal. 1953); [M. Swift & Sons, Inc. v. Lemon](#), 24 F.R.D. 43 (S.D. N.Y. 1959); [Integrity Magnesia Corp. v. Mifflin, McCambridge Co.](#), 28 F.R.D. 596 (E.D. Pa. 1961).
Counterclaims for declaratory relief brought by the claimants against the United States, stemming from the forfeiture of drugs allegedly traceable to methamphetamine manufacture, lacked an actionable basis under the Administrative Procedure Act, since the underlying forfeiture action provided an adequate method of achieving the relief sought by the counterclaims; the applicable statutory defenses to forfeiture required the claimants to prove that the United States acted in an arbitrary and capricious manner. [U.S. v. 662 Boxes of Ephedrine](#), 590 F. Supp. 2d 703 (D.N.J. 2008).
- 2 [Guniganti v. Kalvakuntla](#), 346 S.W.3d 242, 75 U.C.C. Rep. Serv. 2d 201 (Tex. App. Houston 14th Dist. 2011).
- 3 [Hensley Equipment Co. v. Esco Corp.](#), 383 F.2d 252, 11 Fed. R. Serv. 2d 137 (5th Cir. 1967), judgment amended on other grounds, reh'g denied, 386 F.2d 442 (5th Cir. 1967).
As to the "transaction or occurrence" test for compulsory counterclaims, see § 31.
As to permissive counterclaims in this regard, see § 34.
- 4 [Aldens, Inc. v. Packel](#), 524 F.2d 38, 20 Fed. R. Serv. 2d 1173 (3d Cir. 1975).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 42

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II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

2. Contract Claims

§ 42. Claims in contract actions, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  14

A.L.R. Library

[Availability of setoff, counterclaim, or the like to recover either penalty for usury in, or usurious interest paid on, separate transaction or instrument, 54 A.L.R.2d 1344](#)

[Right to set off debt discharged in bankruptcy against claim brought under Truth in Lending Act \(15 U.S.C.A. secs. 1601 et seq.\), 43 A.L.R. Fed. 413](#)

Trial Strategy

[Litigation between Association Members for Breach of Condominium Provisions: Noise, 31 Am. Jur. Trials 193](#)

Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff § 10](#) (Answer—With setoff or counterclaim—For breach of construction contract)

Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff § 16 (Answer—Allegation—Counterclaim—Breach of warranty)

If all other requirements of setoff are satisfied, a cause of action arising from contract may ordinarily be asserted as a setoff in an action based on contract,¹ although the cause of action arises from a contract entirely distinct from that on which the plaintiff's claim is founded.² Indeed, statutes may require that a setoff be based on or grow out of a contract or judgment.³

A counterclaim is generally allowed in an action founded on a contract.⁴ Thus, for instance, in an action based on fraud in the inducement of a contract, the defendant may counterclaim for damages resulting from the plaintiff's failure to perform the contract.⁵

While recoupment is not limited to contract actions,⁶ a defendant generally may recoup a contractual obligation against a contractual obligation.⁷ Note, however, that for a valid contract defense such as recoupment to be asserted, there first must be an enforceable contract between the parties.⁸

Observation:

While there is contrary authority,⁹ the defendant is entitled to recoup to the extent of the damages resulting from a breach of contract.¹⁰

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Footnotes

- 1 Byers v. Lemay Bank & Trust Co., 365 Mo. 341, 282 S.W.2d 512 (1955); Loudee Iron & Metal Co. v. D. Alper & Co., 286 A.D. 707, 146 N.Y.S.2d 422 (1st Dep't 1955); Sanders v. Street's of Tulsa, 1950 OK 41, 202 Okla. 427, 214 P.2d 910 (1950).
- 2 Henderson v. Northwest Airlines, 231 Minn. 503, 43 N.W.2d 786 (1950); Gerald v. Foster, 251 Miss. 63, 168 So. 2d 518 (1964).
- 3 Marks v. Spitz, 4 F.R.D. 348 (D. Mass. 1945).
- 4 Byers v. Lemay Bank & Trust Co., 365 Mo. 341, 282 S.W.2d 512 (1955); Loudee Iron & Metal Co. v. D. Alper & Co., 286 A.D. 707, 146 N.Y.S.2d 422 (1st Dep't 1955).
As to compulsory counterclaims in contract cases, generally, see § 33.
- 5 § 50.
- 6 Di Chiaro v. Spirito, 89 R.I. 50, 150 A.2d 637 (1959).
- 7 Bogdan v. Ausema, 33 Ill. App. 2d 294, 179 N.E.2d 401 (1st Dist. 1962) (action on a promissory note); Williams Hardware Co. v. Phillips, 109 W. Va. 109, 153 S.E. 147 (1930) (finding that if a plaintiff sues

under one promise of a contract, the defendant may recoup damages for breach of another promise of the same contract).

8 [Sloan v. Kubitsky](#), 48 Conn. App. 835, 712 A.2d 966 (1998).

9 [Allie v. Ionata](#), 466 So. 2d 1108 (Fla. 5th DCA 1985), cause dismissed, [469 So. 2d 749](#) (Fla. 1985) and decision approved, [503 So. 2d 1237](#) (Fla. 1987) (holding that a common-law plea in recoupment is a compulsory counterclaim and may exceed the plaintiff's claim).

10 [Smith v. Smith](#), 79 Md. App. 650, 558 A.2d 798 (1989).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 43

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Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

2. Contract Claims

§ 43. Contract claims in tort actions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  14

A.L.R. Library

[Right to set off tort claims and contract claims against one another under sec. 68\(a\) of the Bankruptcy Act \(11 U.S.C.A. sec. 108\(a\)\), 34 A.L.R. Fed. 579](#)

In the absence of statutory authority to the contrary, a contract claim usually cannot be asserted as a setoff in an action based on tort,¹ unless a contractual obligation arises out of the transaction set forth in the complaint as the foundation of the plaintiff's claim or is connected with the subject of the plaintiff's action.² The insolvency or nonresidence of the plaintiff and other facts may also authorize equitable jurisdiction.³

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Footnotes

- 1 [Powell v. Barker, 96 Ga. App. 592, 101 S.E.2d 113 \(1957\); Golmis v. Vlachos, 34 Wash. 2d 627, 208 P.2d 1204 \(1949\).](#)

- 2 [Hughes v. Frank M. Murphy, Inc.](#), 169 Misc. 239, 6 N.Y.S.2d 833 (App. Term 1938); [Pearce v. Plumer](#), 1952 OK 435, 207 Okla. 499, 250 P.2d 846 (1952); [Workman Motor Co. v. Pacific Finance Corporation](#), 83 Utah 19, 26 P.2d 961 (1933).
- 3 [Mercer v. Shiver](#), 81 Ga. App. 815, 60 S.E.2d 263 (1950).
The trial court did not err in allowing the defendant's contract claim for unpaid compensation against the plaintiff's tort claim for conversion where the plaintiff was a nonresident and insolvent. [Global Fibers, Inc. v. Foster](#), 207 Ga. App. 1, 427 S.E.2d 3 (1992).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 44

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Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

2. Contract Claims

§ 44. Claim based on implied contract when tort claim waived

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  14

If a claim sounding in tort may be waived and sued on as an implied contract, the claim generally may be set up as a setoff or counterclaim.¹

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Footnotes

- ¹ [Stevenson v. Ruth](#), 76 F.2d 501 (C.C.A. 3d Cir. 1935); [McFall v. Burley Tobacco Growers' Co-op. Ass'n](#), 246 Ky. 278, 54 S.W.2d 922 (1932).
As to the definition of a counterclaim, see [§ 1](#).
As to the definition of a setoff, see [§ 6](#).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 45

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II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

3. Tort Claims

§ 45. Claims in tort actions, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  15

A.L.R. Library

[Tort claim against which period of statute of limitations has run as subject of setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident, 72 A.L.R.3d 1065](#)

[Cause of action in tort as counterclaim in tort action, 10 A.L.R.2d 1167](#)

[Claim for wrongful death as subject of counterclaim or cross action in negligence action against decedent's estate, and vice versa, 6 A.L.R.2d 256](#)

[Federal Tort Claims Act, 1 A.L.R.2d 222](#)

Trial Strategy

[Malicious Prosecution, 7 Am. Jur. Proof of Facts 2d 181](#)

[Hidden and Multiple Defendant Tort Litigation, 68 Am. Jur. Trials 503](#)

Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff § 64](#) (Motion—To strike counterclaim in tort action)

While some jurisdictions do not allow the interposition of a counterclaim in a tort action, even when the counterclaim grows out of the same occurrence,¹ courts generally allow a counterclaim in a tort action, if the subject matter is proper.²

Since the right to setoff is essentially statutory,³ the right to setoff in an action on a tort depends on the particular statute.⁴ While some statutes have been construed to allow setoffs in tort actions,⁵ other statutes have been construed to exclude setoff in tort actions.⁶

Recoupment is generally allowed in actions based on a tort.⁷

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Footnotes

- 1 [Moore v. Abdalla](#), 197 Miss. 125, 19 So. 2d 502 (1944).
A counterclaim for a tort cannot be set up in an action for another tort, and a claim for slander and malicious prosecution will not be treated as a counterclaim in a conversion action, even if the actions are related. [Benes v. Matulka](#), 182 Neb. 744, 157 N.W.2d 382 (1968).
- 2 [Hoffman v. Stuart](#), 188 Va. 785, 51 S.E.2d 239, 6 A.L.R.2d 247 (1949).
In an action by an automobile driver and her passenger against the defendant for injuries resulting from a collision with the defendant's parked truck, the defendant's counterclaim against the plaintiff driver was a claim arising out of an occurrence which was the subject matter of the complaint and was therefore maintainable as a counterclaim. [Howard Concrete Pipe Co. v. Cohen](#), 139 Ga. App. 491, 229 S.E.2d 8 (1976).
- 3 § 6.
- 4 [General Motors Acceptance Corp. v. Vaughn](#), 358 Ill. 541, 193 N.E. 483 (1934).
- 5 [Great Atlantic & Pacific Tea Co. v. Royal Crown Bottling Co.](#), 243 Md. 280, 220 A.2d 598 (1966).
- 6 [Ladd v. Townsell](#), 38 Ala. App. 181, 79 So. 2d 709 (1955); [Glod v. Baker](#), 998 So. 2d 308 (La. Ct. App. 3d Cir. 2008), writ denied, 1 So. 3d 497 (La. 2009) (suit for wrongful conversion).
- 7 [Di Chiaro v. Spirito](#), 89 R.I. 50, 150 A.2d 637 (1959).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 46

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II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

3. Tort Claims

§ 46. Tort claims in contract actions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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A.L.R. Library

[Right to set off tort claims and contract claims against one another under sec. 68\(a\) of the Bankruptcy Act \(11 U.S.C.A. sec. 108\(a\)\), 34 A.L.R. Fed. 579](#)

While courts have construed setoff statutes to exclude a tort claim as a setoff in a contract action,¹ exceptions have been made for a claim that arises out of a "debt, duty, or contract;"² that arises out of or is incidental to the demand or transaction sued on;³ or that is a demand of a similar nature.⁴ An exception also permits the interposition of a tort claim as a setoff on equitable grounds,⁵ such as when the plaintiff is a nonresident or is insolvent.⁶

Yet other authority expressly allows a party to offset a contract claim with a tort claim. Under such authority, the law permits a party to offset damages with a claim that arises out of the same transaction or occurrence.⁷

Observation:

The principle of recoupment has been found not to apply to allow a party to assert a tort claim against another party as a defense in a breach of contract claim. Thus, for instance, a fence builder could not assert a personal injury claim against a materials supplier as a defense on the amount due to the supplier for unpaid invoices in a breach of contract claim, where the supplier's handling of materials, which resulted in the fence builder's injury, did not stem from the obligations arising from the contract between the parties for the purchase and sale of materials.⁸

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Footnotes

- 1 [Crescent Hat Co. v. Chizik](#), 223 N.C. 371, 26 S.E.2d 871 (1943); [Hook v. Hook & Ackerman](#), 375 Pa. 278, 100 A.2d 374 (1953); [Golmis v. Vlachos](#), 34 Wash. 2d 627, 208 P.2d 1204 (1949).
Tenants could not use a tort claim for an injury suffered in a fall on the stairs to set off their landlord's contract claim in a dispossessory action. [Thomas v. Shapiro](#), 189 Ga. App. 268, 375 S.E.2d 282 (1988).
- 2 [French v. Fletcher Trust Co.](#), 105 Ind. App. 221, 12 N.E.2d 386 (1938).
- 3 [Salina Coca-Cola Bottling Corp. v. Rogers](#), 171 Kan. 688, 237 P.2d 218 (1951); [Big Four Mills v. Commercial Credit Co.](#), 307 Ky. 612, 211 S.W.2d 831 (1948); [Hancammon v. Carr](#), 229 N.C. 52, 47 S.E.2d 614 (1948).
Negligence and fraud claims against a contractor, alleging that the contractor negligently performed work under contracts to place houses on new foundations and that the contractor had falsely represented that the contracts would be performed in a timely and capable manner, were compulsory counterclaims that grew out of and were a part of the transaction sued on by the contractor, alleging breach of contract for failing to place the stakes to locate house positioning. [McNeal v. Kennedy Bros. Contracting, Inc.](#), 771 So. 2d 480 (Ala. Civ. App. 2000).
As to the definition of "same transaction" in the context of counterclaims, see § 28.
- 4 [Golmis v. Vlachos](#), 34 Wash. 2d 627, 208 P.2d 1204 (1949) (finding, in an action on a contract, that an alleged taking of the defendants' property could not be shown as a setoff, since it was not a "demand of like nature," having allegedly occurred after the commencement of the action).
- 5 [Gordy Tire Co. v. Dayton Rubber Co.](#), 216 Ga. 83, 114 S.E.2d 529 (1960).
- 6 [Welch v. Williford](#), 177 Ga. 837, 171 S.E. 768 (1933).
- 7 [Merritt Meridian Const. Co. v. Paramount Fabricators](#), 221 A.D.2d 420, 633 N.Y.S.2d 812 (2d Dep't 1995) (finding, in an action to recover damages caused by a defective product, in which the defendant counterclaimed for the cost of goods sold and delivered, the plaintiff was entitled to offset the defendant's contract counterclaim with its negligence claim, notwithstanding that the plaintiff had given a general release to the codefendant and a limited release to the defendant in settling its claim against them, where the negligence claim arose out of the same transaction or occurrence, and the law allows the offset of a contract claim with a tort claim; moreover, the release was limited in both language and intent).
The evidence supported a cable television company's setoff against a contractor's unpaid invoices for sums it paid a townhouse community for damage the contractor allegedly caused to a sprinkler system; by making a claim against its insurance company, the contractor effectively admitted that its workers had caused the damage. [Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.](#), 162 F.3d 1290, 37 U.C.C. Rep. Serv. 2d 244 (11th Cir. 1998) (applying Florida law).
- 8 [Long v. Reeves Southeastern Corp.](#), 259 Ga. App. 257, 576 S.E.2d 641 (2003).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 47

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Counterclaim, Recoupment, and Setoff

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II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

3. Tort Claims

§ 47. Assault and battery

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  15

A.L.R. Library

[Cause of action in tort as counterclaim in tort action](#), 10 A.L.R.2d 1167

Trial Strategy

[Hidden and Multiple Defendant Tort Litigation](#), 68 Am. Jur. Trials 503

Generally, if one party seeks to recover damages resulting from an affray or encounter of a continuing character, the other party may counterclaim or recoup for the injury that he or she allegedly sustained by the opponent's wrongful act.¹

In an action for personal injuries, a counterclaim alleging facts sufficient to constitute a cause of action for assault and battery may properly be interposed.²

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Footnotes

- 1 [Williams v. Patel](#), 179 Ga. App. 570, 347 S.E.2d 337 (1986); [Sipe v. Farmer](#), 398 So. 2d 1325 (Miss. 1981) (in an action for assault and battery, the defendant's counterclaim alleging alienation of affection of his wife was proper); [Howe v. Struble](#), 90 Ohio App. 172, 47 Ohio Op. 47, 104 N.E.2d 197 (6th Dist. Lucas County 1951) (allowing counterclaims for assault and battery, slander, trespass, and threats of violence in an action for assault and battery).
- 2 [Halpern v. Hindin](#), 141 N.Y.S.2d 799 (Sup 1955).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 48

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II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

3. Tort Claims

§ 48. Defamation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  15

A.L.R. Library

[Cause of action in tort as counterclaim in tort action](#), 10 A.L.R.2d 1167

Generally, in an action for slander, a counterclaim for slander cannot be pleaded if the respective defamations were uttered on different occasions, even if they pertain to the same general subject matter.¹ However, a counterclaim for slander may be allowed in an action for assault and battery,² if the slander allegedly occurred during the assault and battery.³

In actions for libel, counterclaims for other torts are generally not pleadable.⁴ Moreover, a counterclaim for libel cannot be pleaded in an action for libel if the two offenses are separate publications, even if they pertain to the same subject of dispute.⁵ It has been found, however, that a defendant may assert a counterclaim which would be established with the same evidence that is involved in the plaintiff's action for libel and slander.⁶

Caution:

Where allowed, a counterclaim for libel in a tort action is proper only when the alleged libel is connected with the subject matter of the action and does not raise different questions of fact and law from those presented in the main complaint.⁷

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Footnotes

- 1 [Benes v. Matulka](#), 182 Neb. 744, 157 N.W.2d 382 (1968).
- 2 [Collier v. Thompson](#), 180 Ark. 695, 22 S.W.2d 562 (1929).
- 3 [Howe v. Struble](#), 90 Ohio App. 172, 47 Ohio Op. 47, 104 N.E.2d 197 (6th Dist. Lucas County 1951); [Sullivan v. Wheeler](#), 1977 OK CIV APP 16, 566 P.2d 160 (Ct. App. Div. 1 1977).
As to counterclaims for assault and battery, see § 47.
- 4 [Habadank v. Baker](#), 187 Minn. 123, 244 N.W. 546 (1932).
- 5 [Pizor v. Palumbo](#), 391 Pa. 146, 137 A.2d 279 (1958).
- 6 [Ippisch v. Moricz-Smith](#), 1 Misc. 2d 120, 144 N.Y.S.2d 505 (Sup 1955), order modified on other grounds, 1 A.D.2d 968, 150 N.Y.S.2d 419 (2d Dep't 1956) (involving a counterclaim based on fraud and duress).
- 7 [Russo v. Harnett](#), 36 Conn. Supp. 315, 419 A.2d 351 (Super. Ct. 1980).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 49

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II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

3. Tort Claims

§ 49. Malicious prosecution; abuse of process

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  15

A.L.R. Library

[Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in same proceeding in which abuse occurred—state cases, 82 A.L.R.4th 1115](#)

[May action for malicious prosecution be predicated on defense or counterclaim in civil suit, 65 A.L.R.3d 901](#)

Trial Strategy

[Malicious Prosecution, 7 Am. Jur. Proof of Facts 2d 181](#)

[Hidden and Multiple Defendant Tort Litigation, 68 Am. Jur. Trials 503](#)

In an action for malicious prosecution or false arrest, the defendant generally cannot interpose a counterclaim for a distinct tort committed by the plaintiff against the defendant.¹ However, it has been found that the alleged interference with the defendant's right to quietly enjoy his or her adjoining residence is properly presentable by counterclaim in a malicious prosecution action, where the determination as to the existence of probable cause would depend in large measure on the nature of the plaintiff's

use of the premises at the time in question and such factual determination would also be a factor in determining the issues raised by the counterclaim.²

Since no cause of action for malicious prosecution arises until proceedings have terminated,³ a counterclaim for malicious prosecution interposed in the proceeding complained of is not compulsory and, therefore, will not be barred if asserted in a subsequent suit.⁴

In some jurisdictions, setoff may not be pleaded or allowed in an action for malicious prosecution.⁵

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Footnotes

- 1 [Lees v. Smith](#), 363 So. 2d 974 (La. Ct. App. 3d Cir. 1978) (rejected on other grounds by, [DeLoach v. HGI Catastrophe Services, L.L.C.](#), 460 Fed. Appx. 314 (5th Cir. 2012)) (finding, in an action for malicious prosecution, that the defendant could not challenge the suit against him by a reconventional demand alleging malicious prosecution).
- 2 [Ames v. Knobler](#), 19 A.D.2d 705, 241 N.Y.S.2d 697 (1st Dep't 1963), order aff'd, 14 N.Y.2d 879, 252 N.Y.S.2d 86, 200 N.E.2d 772 (1964).
- 3 [Harris v. Steinem](#), 571 F.2d 119, 24 Fed. R. Serv. 2d 1230 (2d Cir. 1978); [De La Cruz v. Du Fresne](#), 512 F. Supp. 1204, 31 Fed. R. Serv. 2d 536 (D. Nev. 1981).
As to unmatured or contingent claims, generally, see §§ 23 to 25.
- 4 [U.S. v. Levering](#), 446 F. Supp. 977 (D. Del. 1978).
While a car owner's malicious prosecution claim arising out of an automobile painting company's replevin suit against her could have been brought as a counterclaim to the company's later suit for damages, the malicious prosecution claim was not required to be brought as a counterclaim, since it owed its existence not to the events on the day she attempted to take her car home, but to the institution and dismissal of the auto painting company's replevin suit that damaged her. [Neil v. South Florida Auto Painters, Inc.](#), 397 So. 2d 1160 (Fla. 3d DCA 1981).
- 5 [Ladd v. Townsell](#), 38 Ala. App. 181, 79 So. 2d 709 (1955).

20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 50

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II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

3. Tort Claims

§ 50. Fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  15

A.L.R. Library

[Cause of action in tort as counterclaim in tort action, 10 A.L.R.2d 1167](#)

In an action for fraud in inducing the plaintiff to enter into a contractual obligation, the defendant may counterclaim for fraud on the plaintiff's part in inducing him or her to enter into the same transaction.¹ In such circumstances, the defendant may also counterclaim for damages resulting from the plaintiff's failure to perform the contract.² However, it has been found, in an action for fraud, that a defendant's counterclaim for damages for false arrest and malicious prosecution on the charge of fraud cannot stand, where there is nothing in common in the plaintiff's action and such counterclaim.³

In some situations, counterclaims for fraud may be considered compulsory counterclaims which must be asserted or else they will be barred. For instance, an insured's coverage-related claims of negligence, fraud, bad faith, breach of contract, and the tort of outrage are compulsory counterclaims which the insured is required to file in an insurer's federal declaratory judgment action over the coverage.⁴

Footnotes

- 1 [Throckmorton v. Johnson](#), 232 A.D. 495, 250 N.Y.S. 426 (1st Dep't 1931).
- 2 [Levin v. Lax & Abowitz](#), 137 Misc. 132, 241 N.Y.S. 486 (N.Y. City Ct. 1930).
- 3 [Murphy v. Appelli](#), 273 A.D. 261, 77 N.Y.S.2d 199 (1st Dep't 1948) (finding, in an action by an automobile buyer against the seller for false representation in the sale, that the seller could not properly interpose a counterclaim for damages for malicious prosecution on a charge of larceny in repossessing the car, because there was nothing in common between the two causes).
As to malicious prosecution in this regard, see § 49.
- 4 [Calhoun v. Pennsylvania Nat. Mut. Cas. Ins. Co., Inc.](#), 676 So. 2d 1332 (Ala. Civ. App. 1996).
As to compulsory counterclaims, generally, see § 3.

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 51

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II. Actions and Claims in Which Remedy Lies

D. Particular Claims and Actions

3. Tort Claims

§ 51. Conversion

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  15

A.L.R. Library

[Cause of action in tort as counterclaim in tort action](#), 10 A.L.R.2d 1167

Trial Strategy

[Hidden and Multiple Defendant Tort Litigation](#), 68 Am. Jur. Trials 503

A cause of action for conversion may be asserted as a counterclaim.¹ In an action for conversion, a counterclaim for a different tort may not ordinarily be pleaded merely because the two offenses arose out of the same dispute.² However, the defendant's contract claim for unpaid compensation has been allowed against the plaintiff's tort claim for conversion, where the plaintiff is a nonresident and insolvent.³

Some jurisdictions consider that setoff may not be pleaded or allowed in an action for conversion.⁴ For example, the setoff principle did not apply to the boat repairer's debt to the boat owner, for wrongfully selling the boat while the repairer was seeking payment for the boat repairs, because the parties' debts to each other were not based on independent contracts; the repairer's debt to the owner was based on conversion, not contract.⁵

Recoupment is generally allowed in actions based on conversion.⁶

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Footnotes

- 1 [Tom Reed Gold Mines Co. v. Brady, 55 Ariz. 133, 99 P.2d 97, 127 A.L.R. 905 \(1940\).](#)
- 2 [Benes v. Matulka, 182 Neb. 744, 157 N.W.2d 382 \(1968\)](#) (finding, in an action to recover damages for the defendant's alleged conversion of the plaintiff's property, that claims for slander and malicious prosecution could not be pleaded as counterclaims).
A counterclaim raised by a ward's son in an action for conversion brought against him by the guardian, alleging that the guardian was guilty of mismanagement, waste, and neglect, was a permissive counterclaim, and thus the trial court did not abuse its discretion in not joining a guardian ad litem to pursue the issue of mismanagement. [Weinberg v. Weinberg, 460 So. 2d 1350 \(Ala. Civ. App. 1984\).](#)
As to the definition of "same transaction" in the context of counterclaims, see § 28.
- 3 [Global Fibers, Inc. v. Foster, 207 Ga. App. 1, 427 S.E.2d 3 \(1992\).](#)
- 4 [Hayes v. O'Shield Buick Co., 94 Ga. App. 177, 94 S.E.2d 44 \(1956\); Tolbird v. Cooper, 136 So. 2d 83 \(La. Ct. App. 3d Cir. 1961\).](#)
Setoff is not allowed in a suit for wrongful conversion. [Glod v. Baker, 998 So. 2d 308 \(La. Ct. App. 3d Cir. 2008\)](#), writ denied, [1 So. 3d 497 \(La. 2009\)](#).
- 5 [Pruitt v. LGR Trucking, Inc., 148 Ohio App. 3d 481, 2002-Ohio-722, 774 N.E.2d 273 \(1st Dist. Hamilton County 2002\).](#)
- 6 [Di Chiaro v. Spirito, 89 R.I. 50, 150 A.2d 637 \(1959\).](#)

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III. Mutuality of Parties and Demands

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A.L.R. Index, Pleadings

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 52

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III. Mutuality of Parties and Demands

A. In General

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West's Key Number Digest

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A.L.R. Library

[Right of garnishee, other than bank holding deposit, to set off claims not due or certain when garnishment is served, 57 A.L.R.2d 700](#)

[Who is an "opposing party" against whom a counterclaim can be filed under Federal Civil Procedure Rule 13\(a\) or \(b\), 1 A.L.R. Fed. 815](#)

Generally, the setoff or counterclaim and the action must be mutual.¹ In other words, the setoff or counterclaim and the action must be between the same parties² and in the same capacity³ or right.⁴ Ordinarily, courts will not allow a counterclaim that requires bringing in a third party who may have an independent claim against the plaintiff.⁵

Courts do have equitable authority, however, to recognize cross-claims between litigants lacking mutuality and to set off one against the other whenever it becomes necessary for a clear equity or to prevent irremediable injustice.⁶ However, there must be some showing of irremediable injustice to invoke the exception to the general rule of mutuality for setoff of debts.⁷ The mere existence of mutual and independent demands does not authorize the court to set them off against each other; rather, the allegations of the bill must show an intervening equity that requires setoff for the protection of the demand sought to be set off.⁸

Caution:

This equitable exception to the strict rule of mutuality will not be applied if one of the claims is owned in whole or in part by a third person.⁹

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Footnotes

- 1 [Transit Cas. Co. v. Selective Ins. Co. of Southeast](#), 137 F.3d 540 (8th Cir. 1998); [Bank of Ozarks v. DKK Development Co.](#), 315 Ga. App. 539, 726 S.E.2d 608 (2012), cert. denied, (Oct. 15, 2012); [In re Marriage of Ballstaedt](#), 606 N.W.2d 345 (Iowa 2000); [Mynatt v. Collis](#), 274 Kan. 850, 57 P.3d 513 (2002); [Jones v. Capitol Enterprises, Inc.](#), 89 So. 3d 474 (La. Ct. App. 4th Cir. 2012), writ denied, 99 So. 3d 651 (La. 2012); [In re Liquidation of American Mut. Liability Ins. Co.](#), 434 Mass. 272, 747 N.E.2d 1215 (2001); [Forbes Equity Exchange, Inc. v. Jensen](#), 2014 ND 11, 841 N.W.2d 759 (N.D. 2014); [Historic Charleston Holdings, LLC v. Mallon](#), 381 S.C. 417, 673 S.E.2d 448 (2009).
The right of setoff arises when two parties are mutually debtor and creditor of each other. [In re Columbia Hosp. for Women Medical Center, Inc.](#), 461 B.R. 648 (Bankr. D. D.C. 2011).
Where a setoff is applied, the debts may arise from different transactions, but they must be mutual. [Westinghouse Credit Corp. v. D'Urso](#), 278 F.3d 138 (2d Cir. 2002) (applying New York law).
For setoff to operate, there must be mutuality of debts and credits, and there are two factors that govern a finding of mutuality: capacity and time. [Koken v. Legion Ins. Co.](#), 865 A.2d 945 (Pa. Commw. Ct. 2004).
- 2 [Westinghouse Credit Corp. v. D'Urso](#), 278 F.3d 138 (2d Cir. 2002); [Lewis v. United Joint Venture](#), 691 F.3d 835 (6th Cir. 2012) (applying Ohio law); [In re C & S Electric, Inc.](#), 433 B.R. 782, 72 U.C.C. Rep. Serv. 2d 784 (Bankr. D. Haw. 2010); [Bank of Ozarks v. DKK Development Co.](#), 315 Ga. App. 539, 726 S.E.2d 608 (2012), cert. denied, (Oct. 15, 2012); [In re Marriage of Ballstaedt](#), 606 N.W.2d 345 (Iowa 2000); [Mynatt v. Collis](#), 274 Kan. 850, 57 P.3d 513 (2002); [In re Liquidation of American Mut. Liability Ins. Co.](#), 434 Mass. 272, 747 N.E.2d 1215 (2001); [Jordet v. Jordet](#), 2012 ND 231, 823 N.W.2d 512 (N.D. 2012).
- 3 [Westinghouse Credit Corp. v. D'Urso](#), 278 F.3d 138 (2d Cir. 2002); [Lewis v. United Joint Venture](#), 691 F.3d 835 (6th Cir. 2012) (applying Ohio law); [U.S. v. Peterson](#), 738 F. Supp. 2d 869 (C.D. Ill. 2010); [In re Marriage of Ballstaedt](#), 606 N.W.2d 345 (Iowa 2000); [Investec Trustees \(Jersey\) Ltd. v. Oppenheimer & Co., Inc.](#), 85 A.D.3d 565, 926 N.Y.S.2d 42 (1st Dep't 2011); [Jordet v. Jordet](#), 2012 ND 231, 823 N.W.2d 512 (N.D. 2012); [Koken v. Legion Ins. Co.](#), 865 A.2d 945 (Pa. Commw. Ct. 2004).
As a general rule, the concept of capacity, for setoff purposes, requires that the parties each owe the other something in his or her own name, and not as a fiduciary. [In re Columbia Hosp. for Women Medical Center, Inc.](#), 461 B.R. 648 (Bankr. D. D.C. 2011).
The purported setoff of a trade debt that the defendant's firm owed his brother's firm against a personal debt the defendant owed his brother failed for lack of mutuality; the debts were due to and from different persons acting in different capacities. [General Elec. Capital Business Asset Funding Corp. v. Hakakian](#), 6 A.D.3d 704, 776 N.Y.S.2d 576 (2d Dep't 2004).
- 4 [Wiand v. Dancing \\$, LLC](#), 919 F. Supp. 2d 1296 (M.D. Fla. 2013), aff'd in part, rev'd in part on other grounds, 2014 WL 4215102 (11th Cir. 2014) (applying Florida law); [Bank of Ozarks v. DKK Development Co.](#), 315 Ga. App. 539, 726 S.E.2d 608 (2012), cert. denied, (Oct. 15, 2012); [Historic Charleston Holdings, LLC v. Mallon](#), 381 S.C. 417, 673 S.E.2d 448 (2009).

- 5 [Unichem Mfg. Co., Inc. v. Witco Chemical Corp.](#), 522 So. 2d 98 (Fla. 3d DCA 1988); [Powers v. Ellis](#), 231 Ind. 273, 108 N.E.2d 132 (1952); [Dickerson v. Dickersons Overseas Co.](#), 369 Pa. 244, 85 A.2d 102 (1952) (citing the principle that a cause of action pleaded as a right of two or more persons jointly is not sustained by proof of a right in one of them).
- A counterclaim may only be asserted against an opposing party and only against that party in the capacity in which that party sued. [Taylor v. Ernst & Young, L.L.P.](#), 130 Ohio St. 3d 411, 2011-Ohio-5262, 958 N.E.2d 1203 (2011).
- A party claiming to be a joint owner of the proceeds in a decedent's accounts with a savings and loan association could not recover the proceeds by means of a counterclaim in the executor's suit to collect the balance allegedly owed by the joint owner on the debt to the decedent, since the proceeds were still in the possession of the savings and loan association and since the savings and loan was not a party to the suit. [Smith v. Fleming](#), 183 Ga. App. 342, 358 S.E.2d 900 (1987).
- Purchasers of an interest in condominium units, sold in violation of state securities law, could not obtain an offset of the amount of mortgage debt incurred to acquire the units in exchange for the return of units; the mortgage debt had been obtained from financial institutions not involved with the issuer, and mutuality of debt required for a setoff was consequently not present. [Adams v. Zimmerman](#), 73 F.3d 1164 (1st Cir. 1996).
- 6 [Farmers' Bank & Trust Co.'s Receiver v. Brown](#), 249 Ky. 820, 61 S.W.2d 628, 91 A.L.R. 323 (1933); [Stewart Title Guar. Co. v. Community Title Co.](#), 924 S.W.2d 62 (Mo. Ct. App. E.D. 1996).
- A special equity may permit a court to set off judgments against nonmutual parties; for example, a court's decision to pierce the corporate veil in order to hold a corporate owner accountable for the debts of a corporate entity might justify setting off a joint debt from an individual debt. [Lewis v. United Joint Venture](#), 691 F.3d 835 (6th Cir. 2012) (applying Ohio law).
- 7 [Stewart Title Guar. Co. v. Community Title Co.](#), 924 S.W.2d 62 (Mo. Ct. App. E.D. 1996).
- 8 [Ryan v. Ryan](#), 271 Ala. 243, 123 So. 2d 102, 100 A.L.R.2d 919 (1960).
- 9 [Hammond Pure Ice & Coal Co. v. Heitman](#), 221 Ind. 352, 47 N.E.2d 309, 145 A.L.R. 997 (1943).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 53

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III. Mutuality of Parties and Demands

A. In General

§ 53. Real and nominal parties

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[Who is an "opposing party" against whom a counterclaim can be filed under Federal Civil Procedure Rule 13\(a\) or \(b\), 1 A.L.R. Fed. 815](#)

While a debt or demand in favor of or against a third person not a party to the action normally cannot be pleaded or allowed as a counterclaim or setoff,¹ courts have equitable authority to allow a setoff against the real party in interest to a demand, although the real party is not a nominal party.² Thus, a cross-demand may be asserted in the same action against a real party in interest appearing through a nominal plaintiff.³ If the litigation is in reality for the sole use and benefit of a party who is not named in the complaint but whose title is absolute, the other party may maintain a counterclaim or setoff against the real party.⁴ Note, setoff can be made only against the real party in interest,⁵ and a court will look through the transactions and nominal parties to determine who are the real parties in interest.⁶

Observation:

The rule requiring mutuality of debts or demands to warrant a counterclaim or setoff generally refers not only to the nominal plaintiff or defendant, but also to the real parties in interest.⁷

A counterclaim may not be asserted against an individual plaintiff who is suing solely in the right of a corporation and not for his or her individual benefit.⁸ Moreover, a corporation which is a nominal defendant and against which no relief is asked is not an adverse party or a defendant entitled to plead a counterclaim against a plaintiff stockholder seeking relief on behalf of the corporation in a representative suit.⁹

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Footnotes

- 1 § 55.
- 2 *Piedmont Print Works v. Receivers of People's State Bank of South Carolina*, 68 F.2d 110 (C.C.A. 4th Cir. 1934); *Bromfield v. Trinidad Nat. Inv. Co.*, 36 F.2d 646, 71 A.L.R. 542 (C.C.A. 10th Cir. 1929).
- 3 *Johnson v. Wilson*, 97 So. 2d 674 (La. Ct. App. 1st Cir. 1957), judgment aff'd in part, rev'd in part on other grounds, 239 La. 390, 118 So. 2d 450 (1960).
- 4 *Farmers' Trust Co. of Maryville, by Cantley v. Tootle-Lacy Nat. Bank of St. Joseph*, 332 Mo. 82, 56 S.W.2d 769 (1933).
- 5 *Proodian v. Plymouth Citrus Growers Ass'n*, 149 Fla. 507, 6 So. 2d 531 (1942).
- 6 *In re First Nat. Bank*, 23 F. Supp. 255 (E.D. Ill. 1938).
- 7 *Johnson v. Wilson*, 97 So. 2d 674 (La. Ct. App. 1st Cir. 1957), judgment aff'd in part, rev'd in part on other grounds, 239 La. 390, 118 So. 2d 450 (1960); *Wesolowski v. Erickson*, 5 Wis. 2d 335, 92 N.W.2d 898 (1958).
- 8 *Aschkenasy v. Teichman*, 12 A.D.2d 904, 210 N.Y.S.2d 593 (1st Dep't 1961).
- 9 *Wesolowski v. Erickson*, 5 Wis. 2d 335, 92 N.W.2d 898 (1958).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 54

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III. Mutuality of Parties and Demands

A. In General

§ 54. Fiduciary and representative parties

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[Who is an "opposing party" against whom a counterclaim can be filed under Federal Civil Procedure Rule 13\(a\) or \(b\), 1 A.L.R. Fed. 815](#)

Generally, one who sues as an individual should not be charged in that action with claims due the defendant from someone whom the plaintiff represents in a different capacity.¹ Thus, a defendant sued for his or her individual debt may not set off a demand that the defendant has against the plaintiff in a fiduciary capacity.² In addition, one who is sued in his or her legal capacity as a representative of another should not be allowed to counterclaim on the basis of claims due him or her individually from the plaintiff.³

A plaintiff suing in a representative or fiduciary capacity should not be subject to a setoff or counterclaim against him or her in an individual capacity.⁴ However, if a plaintiff has sued in a representative capacity but will benefit individually from any recovery, a counterclaim may be made against the plaintiff in his or her individual capacity.⁵

Normally, a trustee may not set off against the trust fund his or her personal claim,⁶ an individual demand against the creator of the trust,⁷ or an indebtedness due him or her individually by the beneficiary.⁸ If the funds of an insolvent entity are by statute

held in trust for all creditors in a class, a creditor may not set off his or her interest in funds held in trust against a debt owed to the insolvent entity.⁹

Observation:

The term "opposing party" as used in the Federal Rule of Civil Procedure¹⁰ regarding counterclaims does not include a trustee suing in a representative capacity,¹¹ the Tennessee Valley Authority when suing as an agent of the United States,¹² or an informer in a qui tam action prosecuted by the United States.¹³ In addition, a defendant's permissive counterclaim is not a claim against an opposing party, if it arises out of a contract between the defendant and the United States in its proprietary role, while the government's claim is prosecuted by the government in its role as a trustee.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Landlord's counterclaim against tenant, who alleged that he had succession rights permitting him to remain in rent-stabilized apartment, did not violate the "capacities" rule; although landlord's third-party complaint asserted claims against tenant in his representative capacity, the counterclaim was properly asserted against tenant in his individual capacity. [Kingsley v. 300 W. 106th St. Corp.](#), 162 A.D.3d 420, 78 N.Y.S.3d 84 (1st Dep't 2018).

[END OF SUPPLEMENT]

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- 1 [Dalton v. Sturdivant Bank](#), 230 Mo. App. 800, 76 S.W.2d 425 (1934); [Wesolowski v. Erickson](#), 5 Wis. 2d 335, 92 N.W.2d 898 (1958).
- 2 [Dakin v. Bayly](#), 290 U.S. 143, 54 S. Ct. 113, 78 L. Ed. 229, 90 A.L.R. 999 (1933).
- 3 [Dalton v. Sturdivant Bank](#), 230 Mo. App. 800, 76 S.W.2d 425 (1934); [Wesolowski v. Erickson](#), 5 Wis. 2d 335, 92 N.W.2d 898 (1958).
- 4 [Banco Nacional de Cuba v. Chase Manhattan Bank](#), 658 F.2d 875, 32 Fed. R. Serv. 2d 79 (2d Cir. 1981); [Tryforos v. Icarian Development Co. S.A.](#), 49 F.R.D. 1, 14 Fed. R. Serv. 2d 5 (N.D. Ill. 1970); [Twardzik v. Sepauley](#), 45 F.R.D. 529 (E.D. Pa. 1968); [Juega v. Davidson](#), 105 So. 3d 575 (Fla. 3d DCA 2012), review dismissed, 123 So. 3d 1146 (Fla. 2013); [Ellison v. Simmons](#), 238 S.C. 364, 120 S.E.2d 209 (1961).
- 5 [Pomfret Farms Ltd. Partnership v. Pomfret Associates](#), 174 Vt. 280, 811 A.2d 655 (2002).
- 6 [People ex rel. Belleci v. Klinger](#), 164 Misc. 530, 300 N.Y.S. 408 (Magis. Ct. 1937).
Debts are not mutual when one party's debt is based on a trust relationship with a third party. [Fluxo-Cane Overseas Ltd. v. E.D. & F. Man Sugar Inc.](#), 599 F. Supp. 2d 639 (D. Md. 2009).

- 7 Watwood v. Real Estate Commission, 196 A.2d 635 (D.C. 1964); Morton v. Beidleman, 1951 OK 241, 205 Okla. 350, 237 P.2d 421 (1951); First Nat. Bank of Waynesboro v. Johnson, 183 Va. 227, 31 S.E.2d 581 (1944).
- 8 Watwood v. Real Estate Commission, 196 A.2d 635 (D.C. 1964); Goodwillie v. City of Bayonne, 2 N.J. 88, 65 A.2d 742, 8 A.L.R.2d 206 (1949); Morton v. Beidleman, 1951 OK 241, 205 Okla. 350, 237 P.2d 421 (1951); Ottarson v. Dobson & Johnson, Inc., 52 Tenn. App. 280, 372 S.W.2d 777 (1963) (allowing for an agreement to the contrary).
- 9 Commissioner of Ins. v. Munich American Reinsurance Co., 429 Mass. 140, 706 N.E.2d 694 (1999).
- 10 Fed. R. Civ. P. 13.
- 11 Pioche Mines Consol., Inc. v. Fidelity-Philadelphia Trust Co., 206 F.2d 336 (9th Cir. 1953).
- 12 U.S. ex rel. and for use of Tennessee Valley Authority v. Lacy, 116 F. Supp. 15 (N.D. Ala. 1953), judgment rev'd on other grounds, 216 F.2d 223 (5th Cir. 1954).
- 13 U S ex rel. Rodriguez v. Weekly Publications, 74 F. Supp. 763 (S.D. N.Y. 1947) (holding that if the government withdraws and if the action is subsequently carried on by the informer, the informer becomes an "opposing party," although the counterclaim will not be pleadable for public policy reasons).
- 14 U.S. v. Timber Access Industries Co., 54 F.R.D. 36 (D. Or. 1971).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 55

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B. Claims by and Against Third Parties

§ 55. Generally

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Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff §§ 81 to 88](#) (Third parties—Motion to bring in third parties)

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff §§ 90 to 93](#) (Third parties—Dismissal of counterclaim)

Generally, a debt or demand in favor of or against a third person who is not a party to the action cannot be pleaded or allowed as a counterclaim¹ or setoff.² Under some statutes, the defendant may seek relief by counterclaim against other persons as well as against the original plaintiff, regardless of whether the other persons are already parties to the action. In order to maintain the counterclaim, however, the relief must be claimed against the original plaintiff, or the matters set up must affect the original plaintiff's rights.³

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Footnotes

- ¹ [Advance Indus. Finance Co. v. Western Equities, Inc.](#), 173 Cal. App. 2d 420, 343 P.2d 408 (2d Dist. 1959); [Scalone v. Talley Motors, Inc.](#), 3 A.D.2d 674, 158 N.Y.S.2d 615 (2d Dep't 1957); [Gilligan v. Prudential Life Ins. Co.](#), 70 Ohio L. Abs. 225, 127 N.E.2d 883 (C.P. 1954); [Perlman v. Pittsburgh Cabinets & Builders](#)

- Supplies, Inc., 191 Pa. Super. 234, 156 A.2d 373 (1959); *Salt Lake City v. Utah Lake Farmers Ass'n*, 4 Utah 2d 14, 286 P.2d 773 (1955).
- 2 *Schultz v. Wilson*, 59 Misc. 2d 14, 297 N.Y.S.2d 478 (N.Y. City Ct. 1969); *Sarkeys v. Marlow*, 1951 OK 195, 205 Okla. 15, 235 P.2d 676 (1951); *Columbus Exchange Trust Co. v. Pennacchini*, 68 R.I. 196, 27 A.2d 187 (1942).
- In an action for tort and breach of contract, the defendant could not set off from the judgment against him the amount for which the plaintiff had released his two codefendants, since the jury had followed the court's instructions to base its verdict upon the tortious acts and contractual breaches of the defendant alone. *Lapidus v. Citizens Federal Sav. and Loan Ass'n*, 389 So. 2d 1057 (Fla. 3d DCA 1980).
- 3 *Hendricks v. Williams*, 151 Fla. 538, 9 So. 2d 923 (1942); *Ruzicka v. Rager*, 305 N.Y. 191, 111 N.E.2d 878, 39 A.L.R.2d 288 (1953).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 56

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III. Mutuality of Parties and Demands

B. Claims by and Against Third Parties

§ 56. Setoff between pledgee and obligor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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In the determination of whether a setoff is available as between a debt represented by an instrument pledged as collateral to secure the pledgor's own indebtedness to the pledgee and a debt owed by the pledgee to the obligor of the instrument, the question is essentially whether the mutuality of obligation on which the right to setoff depends exists in the required degree and at the controlling moment as between the debt represented by the pledged instrument and the debt owed by the pledgee to the obligor of the instrument. If the pledgee is actually or in effect the owner of the pledged instrument at the time which controls the right of setoff, the necessary mutuality has been achieved and justifies a setoff. If the pledgee's interest in the instrument at that time is only in the nature of a lien, however, and if he or she is in effect only a trustee for the pledgor, the mutuality required for setoff may be lacking.¹ Which of these alternative situations will prevail in a given case depends on one or more factors bearing on the point.² The position of the pledgee as a mere trustee to collect for the pledgor rather than essentially as an owner of the pledged instrument may be determined by the nature of the collateral, the collateral's apparently greater value in comparison to the debt that it was pledged to secure, and the pledgor's own superior claim of setoff against the pledgee.³ A particular arrangement or course of dealing among the interested persons may also establish that the pledgee was in effect an owner.⁴

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Footnotes

- 1 [Manchester Premium Budget Corp. v. Manchester Ins. & Indem. Co.](#), 612 F.2d 389, 16 Ohio Op. 3d 311 (8th Cir. 1980).
- 2 [Hammond Pure Ice & Coal Co. v. Heitman](#), 221 Ind. 352, 47 N.E.2d 309, 145 A.L.R. 997 (1943).
- 3 [Southern Ry. Co. v. Elliott](#), 86 F.2d 294 (C.C.A. 4th Cir. 1936) (denying setoff).

4 [Willing v. Lupin Bldg. & Loan Ass'n](#), 20 F. Supp. 774 (E.D. Pa. 1937); [Leonard v. Taylor](#), 183 Ark. 933, 39 S.W.2d 704 (1931).

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20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 57

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III. Mutuality of Parties and Demands

B. Claims by and Against Third Parties

§ 57. Third party that is outside jurisdiction and required for counterclaim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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Under the Federal Rules of Civil Procedure, a counterclaim is not compulsory if the claim requires adding another party over whom the court cannot acquire jurisdiction.¹ Similar state rules provide that a counterclaim that requires for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction is not compulsory.²

Caution:

This exception to the compulsory counterclaim rule is limited to cases in which the court is unable to obtain personal jurisdiction over the additional parties.³

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Footnotes

- ¹ [Fed. R. Civ. P. 13\(a\)\(1\)\(B\)](#).
As to compulsory counterclaims, generally, see [§ 3](#).

- 2 [Levin v. Hindhaugh](#), 167 Ariz. 110, 804 P.2d 839 (Ct. App. Div. 2 1990); [Welty Bldg. Co., Ltd. v. Indy Fedreau Co., LLC](#), 985 N.E.2d 792 (Ind. Ct. App. 2013); [Pence v. Rawlings](#), 453 N.W.2d 249 (Iowa Ct. App. 1990); [G.A.W., III v. D.M.W.](#), 596 N.W.2d 284 (Minn. Ct. App. 1999); [U.S. Fire Ins. Co. v. Southeast Airmotive Corp.](#), 102 N.C. App. 470, 402 S.E.2d 466 (1991); [Faerber v. Cavanagh](#), 568 A.2d 326 (R.I. 1990); [Moore v. First Financial Resolution Enterprises, Inc.](#), 277 S.W.3d 510 (Tex. App. Dallas 2009).
- 3 [United Artists Corp. v. Masterpiece Productions](#), 221 F.2d 213 (2d Cir. 1955).
As to subject-matter jurisdiction of a counterclaim, see § 95.

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III. Mutuality of Parties and Demands

C. Joint and Separate Claims or Demands

§ 58. Generally

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In the absence of a statutory provision or circumstances calling for equitable relief, neither a joint debt or claim may be set off or counterclaimed against a separate demand,¹ nor may a separate debt or claim be set off or counterclaimed against a joint demand.² Thus, a demand not due from all plaintiffs to all defendants cannot be set off or counterclaimed.³

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Footnotes

- ¹ [Daniel v. Wilhoit](#), 289 Ky. 79, 158 S.W.2d 153 (1942); [Plante v. M. Shortell & Son](#), 92 N.H. 38, 24 A.2d 498, 139 A.L.R. 1325 (1942).
- ² [Lewis v. United Joint Venture](#), 691 F.3d 835 (6th Cir. 2012) (applying Ohio law); [Goldstein v. Katz](#), 325 Mass. 428, 91 N.E.2d 237 (1950); [Plante v. M. Shortell & Son](#), 92 N.H. 38, 24 A.2d 498, 139 A.L.R. 1325 (1942); [Cohn v. Krauss](#), 45 Ohio L. Abs. 148, 67 N.E.2d 62 (Ct. App. 1st Dist. Hamilton County 1943).
- ³ [Eistrat v. Humiston](#), 160 Cal. App. 2d 89, 324 P.2d 957 (4th Dist. 1958); [Cohn v. Krauss](#), 45 Ohio L. Abs. 148, 67 N.E.2d 62 (Ct. App. 1st Dist. Hamilton County 1943).

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III. Mutuality of Parties and Demands

C. Joint and Separate Claims or Demands

§ 59. Joint and several claim or demand

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In some jurisdictions, the availability of a setoff or counterclaim against a plaintiff and in favor of fewer than all defendants depends on whether the defendant or defendants having the claim are severally liable to the plaintiff or are liable jointly with the other defendant or defendants to the suit. If a "several" judgment may be entered against the defendant or defendants, a claim in favor of the defendant or defendants against a plaintiff or plaintiffs is available as a setoff or counterclaim.¹ This rule has been applied in tort actions² and has been codified in some jurisdictions.³

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- ¹ [Merchants' Nat. Bank of Los Angeles v. Clark-Parker Co.](#), 215 Cal. 296, 9 P.2d 826, 81 A.L.R. 778 (1932); [Burns v. Gulf Oil Corp.](#), 246 N.C. 266, 98 S.E.2d 339 (1957).
No setoff against any settlement paid by a real estate agency was necessary or appropriate in an action by home purchasers against the vendor's listing agent for a violation of the Consumer Fraud Act, where the trial court made it clear that the damage award was imposed against the agent individually for the purpose of disgorging the amount that it was unduly enriched, and the award was thus clearly individual, not joint and several, based on the sales commission that the agent had received. [Vastano v. Killington Valley Real Estate](#), 187 Vt. 628, 2010 VT 12, 996 A.2d 170 (2010).
- ² [Griffin v. Scott](#), 203 S.C. 430, 27 S.E.2d 570 (1943); [Manley v. Razien](#), 160 S.W.2d 995 (Tex. Civ. App. Amarillo 1942).
- ³ [Burns v. Gulf Oil Corp.](#), 246 N.C. 266, 98 S.E.2d 339 (1957).

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III. Mutuality of Parties and Demands

C. Joint and Separate Claims or Demands

§ 60. Fractional interests in claims, demands, or obligations

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The requirement of mutuality of parties and demands bears on the right of the owner of a fractional interest in a claim to set off his or her interest in the claim against a debtor's demand against the fractional owner and also on the right to set off one debt against a fractional interest in another.¹ If an attorney has a lien or assignment interest in a judgment obtained for his or her client, the court may approve the setting off of a claim against the judgment to the extent that the judgment is not subject to the attorney's lien or assignment.² Furthermore, if complainants are not claiming definite shares of a mortgage debt alleged to be owing to them jointly by defendants, one defendant may not set off a claim for certain labor performed for one complainant.³

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- ¹ [Plante v. M. Shortell & Son](#), 92 N.H. 38, 24 A.2d 498, 139 A.L.R. 1325 (1942) (holding that the purchaser of a right of participation in a note may not set off the interest so acquired against a debt owed to the maker). As to the requirement of mutuality of parties and demands, generally, see [§ 52](#).
- ² [In re Proffen's Estate](#), 175 Misc. 447, 24 N.Y.S.2d 889 (Sur. Ct. 1940) (not discussing the right to set off as affected by the fact that only a fractional interest in the judgment was involved).
- ³ [Scarano v. Scarano](#), 132 N.J. Eq. 362, 28 A.2d 425 (Ch. 1942).

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IV. Effect of Assignment of Claim, Action, or Contract; In General

§ 61. Assigned claim subject to counterclaim or setoff; generally

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An assignee suing on an assigned claim is an "opposing party," against whom compulsory or permissive counterclaims may be asserted.¹ A claim that has been assigned is subject to any right of setoff or counterclaim held by the debtor against the assignor at the time of the assignment or when the obligor or assignee gives notice of the assignment. The assignee takes the claim subject to equities and defenses that exist between the assignor and the debtor at the time the claim arose² or that accrue before notice of the assignment,³ including a valid setoff based on facts existing at the time of the assignment,⁴ or based on facts arising after assignment but before the debtor had knowledge of the assignment.⁵ Therefore, a debtor with actual notice of the assignment may not set off its claim against a claim that the purchaser of the debtor's accounts makes against the debtor.⁶ Elsewhere, however, the date of notice is not significant, and an assignee is subject to any defense that may be raised against the assignor, if the right of action has accrued at the time of assignment; whether the defendant's claim against the assignor has matured determines whether the claim may be set off against the assignee.⁷

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Footnotes

- 1 [Legate v. Maloney](#), 348 F.2d 164, 9 Fed. R. Serv. 2d 13B.1, Case 1 (1st Cir. 1965) (construing [Fed. R. Civ. P. 13](#)).
As to the assignment of claims against the United States, see [31 U.S.C.A. § 3727](#).
As to real and nominal parties, see [§ 53](#).
- 2 [Ertel v. Radio Corp. of America](#), 171 Ind. App. 51, 354 N.E.2d 783, 20 U.C.C. Rep. Serv. 792 (1976); [Nancy's Product, Inc. v. Fred Meyer, Inc.](#), 61 Wash. App. 645, 811 P.2d 250 (Div. 3 1991).
An assignee who asserts a claim based on the assignment of a contract right is subject to an offsetting claim that the seller would have against their assignor arising from the same transaction; this concept, known as

"recoupment," applies even if the seller could not affirmatively assert that claim against the assignee. [Pines Plaza Ltd. Partnership v. Berkley Trace, LLC](#), 431 Md. 652, 66 A.3d 720 (2013).

As to the definition of a counterclaim, see § 1.

3 [Heath v. Knutson](#), 73 Or. App. 519, 698 P.2d 1015, 40 U.C.C. Rep. Serv. 1903 (1985).

4 [Rittenberg v. Donohoe Const. Co., Inc.](#), 426 A.2d 338 (D.C. 1981).

5 [Head v. Southern Development Co.](#), 614 So. 2d 1044 (Ala. 1993).

6 [Heath v. Knutson](#), 73 Or. App. 519, 698 P.2d 1015, 40 U.C.C. Rep. Serv. 1903 (1985).

The equitable remedy of setoff was proper where the assignee of the cause of action was aware at the time of the assignment that the assignor owed a debt to the opposing party although the debt was not yet liquidated.

[Justice Bail Bonds v. Samaniego](#), 68 S.W.3d 811 (Tex. App. El Paso 2001).

7 [Hefley v. Jones](#), 687 F.2d 1383, 35 Fed. R. Serv. 2d 298 (10th Cir. 1982).

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§ 62. Offensive and defensive uses of assigned setoffs and counterclaims

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A counterclaim affirmatively asserted against the original obligor, rather than against an assignee, is an independent basis for recovery and not merely a defense.¹ If the counterclaim is against an assignee for damages or indebtedness due to the claimant from the assignor in an amount exceeding the assignee's claim, however, the counterclaim can be used defensively only.² In such cases, because the assignee was not indebted to the counterclaimant in the first instance, the counterclaimant cannot obtain an affirmative recovery from the assignee.³

The rule that an assignee of a claim takes the claim subject to equities and defenses that exist between the assignor and the debtor at the time the claim arose⁴ does not extend to a setoff or counterclaim arising out of an independent contract, regardless of whether the contract was made before or after notice of the assignment.⁵ Because an assignee must perform only the obligations that the assignee contracts to undertake, no action lies against the assignee for a failure to perform obligations due from the assignor to the obligor.⁶ An assignee must expressly assume any duties correlative with the right assigned, since there is no implication of assumption of those duties from the mere fact of the assignment.⁷

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Footnotes

- ¹ § 1.
- ² *Joseph V. Edeskuty & Associates v. Jacksonville Kraft Paper Co., Inc.*, 702 F. Supp. 741 (D. Minn. 1988); *Nancy's Product, Inc. v. Fred Meyer, Inc.*, 61 Wash. App. 645, 811 P.2d 250 (Div. 3 1991).
- ³ *St. Paul Ins. Companies v. Gentry*, 340 So. 2d 442 (Miss. 1976).
- ⁴ § 61.

- 5 National Sur. Corp. v. Algernon Blair, Inc., 114 Ga. App. 30, 150 S.E.2d 256 (1966), rev'd on other grounds,
222 Ga. 672, 151 S.E.2d 724 (1966); R.A.N. Consultants, Inc. v. Peacock, 201 Ill. App. 3d 67, 147 Ill. Dec.
283, 559 N.E.2d 283 (3d Dist. 1990).
- 6 Rittenberg v. Donohoe Const. Co., Inc., 426 A.2d 338 (D.C. 1981).
- 7 Pumphrey v. Kehoe, 261 Md. 496, 276 A.2d 194 (1971).

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IV. Effect of Assignment of Claim, Action, or Contract; In General

§ 63. Collusive use of assignment in order to defeat jurisdiction

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West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#) 49(1), 52(1)

In federal courts, assignment may not be used collusively¹ to create² or defeat³ jurisdiction. Whether or not an assignment has been made collusively depends on a number of factors and suspicious circumstances, including:⁴

- whether consideration was paid for the acquisition of the claim
- the assignor's other motives, if any
- whether the assignor retained an interest in the claim
- who controls the resulting litigation

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- ¹ 28 U.S.C.A. § 1359.
- ² *Dweck v. Japan CBM Corp.*, 877 F.2d 790 (9th Cir. 1989).
- ³ *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181 (5th Cir. 1990).
- ⁴ *Dweck v. Japan CBM Corp.*, 877 F.2d 790 (9th Cir. 1989).

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§ 64. Claim arising or maturing following assignment

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Generally, a claim that arises in favor of a defendant against an assignor and that matures subsequent to the assignment or notice of the claim cannot be set off or counterclaimed against the claim of the assignee.¹ It has been found, however, that a defendant may set up as a defense a breach of contract occurring after the assignment, if the defendant has notified both the assignor and the assignee of the claimed breach within a reasonable time.²

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- ¹ [St. Paul Ins. Companies v. Gentry](#), 340 So. 2d 442 (Miss. 1976).
- ² [Shreve Land Co., Inc. v. J & D Financial Corp.](#), 421 So. 2d 722, 35 U.C.C. Rep. Serv. 429 (Fla. 3d DCA 1982).

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IV. Effect of Assignment of Claim, Action, or Contract; In General

§ 65. Waiver and estoppel; debtor's representations to assignee

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[Waiver or estoppel with respect to debtor's assertion, as setoff or counterclaim against assignee, of claim valid as against assignor, 51 A.L.R.2d 886](#)

By representation or conduct, a debtor may waive the right to assert counterclaims and setoffs against an assignee or be estopped from asserting them.¹ Under general equitable principles, a debtor is estopped to urge against an assignee a claim that the debtor had against the assignor, if the debtor failed to advise the assignee of the existence of such a claim and induced the assignee to rely on the nonexistence of a claim against the assigned obligation.² A debtor with a counterclaim against the assignor must inform the assignee of the counterclaim when the debtor is notified of or becomes aware of the assignment, and the failure to inform the assignee will estop the debtor from later asserting the counterclaim against the assignee.³ A debtor will be estopped to set off against the assignee a counter-obligation of the assignor, if, prior to taking the assignment, the assignee inquired as to the validity of the debt to be assigned, and the debtor represented that it was valid for its face amount. Estoppel results in such circumstances even absent fraudulent or deceitful intent on the part of the debtor.⁴ It has also been found, however, that a debtor was not estopped due to a failure to notify the assignee of a counterclaim against the assignor, despite having an early and ample opportunity to do so.⁵

Partial payments may have the same effect; a defendant who pays the assignee may be estopped from later raising claims inconsistent with the obligation to make payments.⁶ Partial payments on account to the assignee do not foreclose the debtor from later asserting a setoff against the assignee, however, if the equities of the situation were favorable to the debtor.⁷

If, after knowing of the assignment, the debtor expressly promises to make future payments on the obligation to the assignee rather than to the assignor, estoppel will bar a preexisting setoff claim by the debtor against the assignor.⁸ There will be no estoppel, however, if the debtor's promise is so qualified as to constitute an undertaking to pay only whatever net amount might prove to be owing from the debtor to the assignor, rather than an absolute assumption of liability for the entire face amount of the obligation.⁹

If the circumstances give the assignee notice of possible counterclaims of the debtor, the failure to formally notify the assignee of the counterclaims will not estop the debtor from setting off such counterclaims against the assignee.¹⁰ In the absence of detrimental reliance by the assignee induced by the debtor's silence, the debtor will not be estopped from asserting against the assignee the debtor's counterclaim against the assignor.¹¹

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Footnotes

- 1 [Pacific Northwest Life Ins. Co. v. Turnbull](#), 51 Wash. App. 692, 754 P.2d 1262 (Div. 2 1988).
As to waiver or estoppel concerning counterclaims, generally, see § 12.
- 2 [Dickerson, Inc. v. Federal Deposit Ins. Corp.](#), 244 So. 2d 748 (Fla. 1st DCA 1971), writ discharged, 255 So. 2d 521 (Fla. 1971); [Security State Bank of Great Bend v. Midwest Foundry](#), 177 Kan. 151, 277 P.2d 629, 51 A.L.R.2d 882 (1954).
- 3 [National City Bank of New York v. Prospect Syndicate](#), 170 Misc. 611, 10 N.Y.S.2d 759 (Mun. Ct. 1939).
- 4 [Commerce Union Bank v. Blalock](#), 38 Tenn. App. 260, 273 S.W.2d 487 (1954).
- 5 [De Laval Separator Co. v. Sharpless](#), 134 Iowa 28, 111 N.W. 438 (1907).
- 6 [Guaranty Securities Co. v. Equitable Trust Co.](#), 136 Md. 417, 110 A. 860 (1920); [Simmons v. Smith County Bank](#), 225 Miss. 384, 83 So. 2d 441 (1955).
- 7 [Bank of Commerce of Charlotte, N. C. v. Waters](#), 215 S.C. 543, 56 S.E.2d 350 (1949).
- 8 [Black Motor Co. v. Call](#), 264 Ky. 40, 94 S.W.2d 35 (1936).
- 9 [Northwestern Nat. Bank v. Commonwealth](#), 345 Pa. 192, 27 A.2d 20 (1942).
- 10 [Harry Hall & Co. v. Consolidated Packing Co.](#), 55 Cal. App. 2d 651, 131 P.2d 859 (1st Dist. 1942).
- 11 [E.V. Harmon & Co. v. Wm. Filene's Sons Co.](#), 232 Mass. 52, 121 N.E. 504 (1919).

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